Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term 1997

JOSEPH HARMON and MARILYN HARMON,

Petitioner,

v.

OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Where a removal petition pursuant to 28 U.S.C. § 1332(a) is totally absent of the allegation or facts regarding the amount in controversy at the time of removal, can a district court rely upon post removal information to justify federal diversity jurisdiction?**

II. **Is the amount in controversy pursuant to 28 U.S.C. § 1332(a) jurisdictional and not waivable pursuant to 28 U.S.C. § 1447(c)?**

LIST OF PARTIES

Joseph and Marilyn Harmon, Petitioners. OKI Systems and Crown Equipment Corporation, Respondents.

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OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioners, Joseph and Marilyn Harmon, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals appears at 115 F. 3d 477 (7th Cir. 1997) and is reproduced in the Appendix filed herewith ("App.") at 1a. The district court opinion regarding the issue of remand in this case appears at 902 F. Supp. 176 (S.D. Ind. 1995) and is reproduced at 11a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 2, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provision of Title 28 -- Judiciary and Judicial Procedure -- § 1332. Diversity of citizenship; amount in controversy; costs is set forth below:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Also, the pertinent provision of Title 28 -- Judiciary and Judicial Procedure -- § 1447. Procedure after removal generally, is set forth below:

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT OF THE CASE

On July 29, 1991, Mr. Harmon was injured while operating a Crown Equipment Corp., Inc. (hereinafter "Crown") stand up forklift. As a result of his injuries, the Harmons filed an action in the Johnson County Superior Court No., State of Indiana alleging Crown was responsible for his injuries due to the negligentdesign of the forklift. The Harmons also included an allegation against Defendant OKI Systems, Inc. (hereinafter "OKI") for negligent maintenance.

Crown removed the case to federal court on August 20, 1993 (App. B, 11a). During discovery, the Harmons learned the removal petition filed by Crown had numerous defects, one of which was "no explicit allegation that the amount in controversy exceeded $50,000 exclusive of interest and costs" (App. B, 11a) as required by 28 U.S.C. § 1332(a). Accordingly, the Harmons requested remand of the case based upon lack

of subject matter jurisdiction at the time of removal. During the remand hearing, Crown admitted to the district court that as far as the jurisdictional amount for § 1332(a), it did not have that information at the time it attempted its removal.

After the remand hearing, Crown moved the district court to amend its removal petition based upon 28 U.S.C. § 1653. In doing so, Crown submitted post removal information for the court's consideration. The Harmons objected to the information because said information was not in the record at the time the removal petition was filed. The district court stated that "such evidence need not be submitted as part of the removal papers" (App. B, 16a). The district court allowed Crown to amend its removal petition after oral argument to insert the amount in controversy requirement even though Crown had no facts to support the amount in controversy requirement at the time the removal petition was filed.

The district court agreed with the Harmons that the "jurisdictional controversy in this case was caused by a defendant's removal [sic] papers that omitted elementary allegations" (App. B, 17a). Further, the district court stated the Tenth Circuit opinion of *Laughlin v. Kmart Corporation, 50 F. 3d 871, (10th Cir. 1995) certiorari denied, 116 S. Ct. 174* "squarely supports" the Harmons' position (App. B, 15a). However, the district court stated it could not follow Laughlin since it expressly disagreed with the Seventh Circuit decision of *Shaw v. Dow Brands, 944 F. 2d 364, (7th Cir. 1993)* (App. B, 16a). Secondly, the district court maintained the total absence of the amount in controversy requirement was procedural rather than jurisdictional, and thus, the

Harmons waived remand pursuant to 28 U.S.C. § 1447(c). Thirdly, the district court allowed Crown to use information not in the record at the time of removal to defend against the Harmons remand petition.

On October 10, 1995, the district court denied the Harmons' motion to remand and entered summary judgment for Crown on October 10, 1995. The district court also entered summary judgment for OKI on August 13, 1996.1

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed that the district court denial of not error in denying the motion to remand. The appellate court maintained that a district court should not be barred from considering evidence not in the record at the time of removal to determine if federal subject matter jurisdiction existed. It held that "the test should simply be whether the evidence sheds light on the situation which existed when the case was removed" (App. A, 7a). The Seventh Circuit never attempted to reconcile its difference with the opinion of *Laughlin or Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F. 3d 424, 428 (7th Cir. 1997)* (App. A, 6a).

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1 The Petitioners are not seeking review by this Court of the summary judgment rulings for Crown and OKI because the district court lacked subject matter jurisdiction to enter such orders.

REASONS FOR GRANTING THE WRIT

This case will impact every federal case wherein jurisdiction is based upon diversity pursuant to 28 U.S.C. § 1332(a).

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on the issue of whether the amount in controversy for purposes of diversity jurisdiction must be affirmatively plead and supported by the removing party at the time of removal.

The Tenth Circuit held that the failure to allege the amount in controversy was a jurisdictional defect that could not be waived or conferred. *Laughlin* 50 F. 3d at 873.

***Laughlin* is very similar to this case. There, an employee brought an action in state court against his former employer alleging breach of an employment contract and wrongful termination. The employer removed the action to federal court. The employer's notice did not refer to an amount in controversy although the Plaintiffs' complaint was attached as an exhibit. The Plaintiff neither objected to removal or questioned the amount in controversy. The federal court granted summary judgment in favor of the employer, and the Plaintiff appealed. At the time of the appellate proceedings, the appellate court raised the issue of the existence of diversity jurisdiction and found the same to be lacking. Accordingly, the appellate court reversed the trial court with instructions to vacate its judgment and remand the action to state court. 50 F. 3d at 874.**

In doing so, the Tenth Circuit held the amount in controversy constitutes subject matter jurisdiction and cannot be waived. Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings. 50 F. 3d at 873. Moreover, if the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter. 50 F. 3d at 873. "'[T]he rule ... is inflexible and without exception, which requires [a] court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.' " 50 F. 3d at 873 citing *Compagnie des Bauxites*, 456 U.S. at 702, 102 S. Ct. at 2104 (quoting *Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 511, 28 L. Ed. 462 (1984)*).

However, the Seventh Circuit has created an entirely different rule in this case. The Seventh Circuit maintains it is not necessary for the amount incontroversy to be affirmatively plead or proven by facts in the record at the time of removal. "The test should simply be whether the evidence sheds light on the situation which existed when the case was removed" (App. A, 7a).

Within the Seventh Circuit itself, there is a split of authority. In *Chase*, a different panel held that the "court, however, is limited to examining only that evidence of the amount in controversy that was available at the moment the petition for removal was filed" (App. A, 5a). 110 F. 3d at 428.

The district court denied the Harmons' remand petition partly upon the Seventh Circuit case of *Shaw v.*

Dow Brands, 944 F. 2d 364, (7th Cir. 1993) (App. B, 16a). In *Shaw*, the Seventh Circuit maintained the amount in controversy can be waived.

Shaw has been questioned by several federal courts. See, *Laughlin* 50 F. 3d at 873-4; *United Food & Commercial Workers Union v. Centermark Properties Meriden Square, Inc., 30 F. 3d 298, 303-4 (2nd Cir. 1994)*; *Prizevoits v. Indiana Bell Telephone Co., 76 F. 3d 132, 134 (7th Cir. 1996).* Also, see *Heichman v. American Telephone and Telegraph Company, 943 F. Supp. 1212, 1221, fn. 1 (C.D. Cal. 1995).*

Without a definitive rule or at least more specific guidance, the lower courts will use a hodgepodge of conflicting rules and theories to reach contradictory conclusions as to whether the amount in controversy must be affirmatively plead and proven by facts in the record at the time of removal. The decision by the Unites States Court of Appeals for the Seventh Circuit in this case demonstrates the danger of continued uncertainty regarding federal subject matter jurisdiction at the time of removal.

Not only is there a split among federal courts, the decision of the Seventh Circuit is contrary to United States Supreme Court precedence that the amount in controversy is determined on the basis of the record at the time the petition for removal is filed. *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 291-293 (1938).*

Thirdly, the decision of the Seventh Circuit is contradictory to preservation of state and federal comity. Federal courts are courts of limited jurisdiction_whose

power is limited strictly by Article III of the Constitution and congressional statute. *Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 1331 (1986).* Federal courts are required to resolve all doubts about federal jurisdiction in favor of remand. *Steel Valley Auth. v. Union Switch & Signal Div., 809 F. 2d 1006, 1010 (3d Cir.1987), cert. denied, 484 U.S. 1021, 108 S. Ct. 739.* There is a general judicial rule that removal statutes are to be strictly construed against removal. *Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, (1941).*

I. WHERE A REMOVAL PETITION PURSUANT TO 28 U.S.C. § 1332(a) IS TOTALLY ABSENT OF THE ALLEGATION OR FACTS REGARDING THE AMOUNT IN CONTROVERSY AT THE TIME OF REMOVAL, A DISTRICT COURT CANNOT RELY UPON POST REMOVAL INFORMATION TO JUSTIFY FEDERAL DIVERSITY JURISDICTION.

The Seventh Circuit's opinion in this case expands federal jurisdiction beyond the United States Constitution and established Supreme Court precedence. The amount in controversy is a jurisdictional requirement which must exist by facts in the record at the time of removal. Established case law requires that subject matter jurisdiction must exist at the time of removal. *St. Paul Mercury Indemnity Co.*, 303 U.S. at 291-293. A party alleging jurisdiction must justify its allegations by a preponderance of evidence. *McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S. Ct. 780, 785 (1936).*

Crown's removal petition had no explicit allegation that the amount in controversy exceeded $50,000 exclusive of interests and costs (App. B, 11a-12a). ". . . The amount in controversy is determined on the basis of the record existing at the time the petition for removal is filed." 14 A Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2d §3725, pg. 417 (1985); *St. Paul Mercury Indemnity Co.*, 303 U.S. at 291-293.

The opinion of the Seventh Circuit violates every Supreme Court and federal precedent that requires the amount in controversy must be alleged and proven at the time the removal petition is filed. The Seventh Circuit's opinion violates state and federal comity.

The recent opinion of *Caterpillar, Inc. v. Lewis, 117 S. Ct. 467 (1996)* is not controlling here. In *Caterpillar*, the question was whether complete diversity existed between two parties. *Caterpillar* did not involve a total absence of the allegation or facts regarding the amount in controversy at the time of removal. However, the Court should consider the prediction noted in *Caterpillar* that defendants will prematurely remove cases to federal court in hopes that some subsequent developments will permit the case to remain in federal court. 117 S. Ct. at 477. This prediction has come true in this case. This case underscores the need of this Court to carefully guard the door through which federal diversity jurisdiction is granted. Absent such vigilance, the flood gates of removal petitions will swamp the federal judiciary.

II. THE AMOUNT IN CONTROVERSY PURSUANT TO 28 U.S.C. § 1332(a) IS JURISDICTIONAL AND NOT WAIVABLE PURSUANT TO 28 U.S.C. § 1447(c).

The amount in controversy is a subject matter jurisdictional requirement for federal jurisdiction and the absence of the requirement is not waivable pursuant to 28 U.S.C. § 1447(c).2 The district court maintained that the absence of the allegation and facts to support the amount in controversy at the time of removal was a procedural defect, and thus waived by the Harmons since the Harmons did not object to the removal within 30 days. The Seventh Circuit did not directly or indirectly address this specific finding. So unique was the district court's holding that opinion, not one case was cited from any federal authority to support the idea that the amount in controversy is a procedural defect which can be waived.

To the contrary, federal authority supports the Harmons' position that the amount in controversy is jurisdictional and not procedural. The amount in controversy is considered jurisdictional. "[A]

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2 There is no difference between the pre and post 1988 amendments to 28 U.S.C. § 1447(c) regarding lack of subject matter jurisdiction. The 1988 amendment in no way changed the long standing rule that subject matter jurisdiction can never be waived. The 1988 amendment only addressed procedural errors in the removal process. *Page v. City of Southfield*, 45 F. 3d 128, 132 (6th Cir. 1995).

jurisdictional amount requirement goes to subject matter jurisdiction and lack of it cannot be waived . . ." ***Baris v. Sulpicio Lines, Inc., 932 F. 2d 1540, 1552, n.6, (5th Cir. 1991).***

The district court maintained since the Harmons did not file their motion to remand within 30 days, they waived subject matter jurisdiction pursuant to 28 U.S.C. §1447(c). The district court confused subject matter jurisdiction with procedural defects in the removal petition.

Any defect in removal procedure includes all non-jurisdictional defects existing at the time of removal. ***In re: Allstate Ins. Co., 8 F. 3d 219, (5th Cir. 1993).*** **A procedural defect is any defect that does not go to the question of whether the case originally could have been brought into federal court.** ***Baris*****, 932 F. 2d at 1544.** ***In*** **construing 28 U.S.C. Sec. 1447(a), (procedural defect the Baris opinion defined any defect in the removal procedure as all non-jurisdictional defects existing at the time of removal.** ***Baris*****, 932 F. 2d at 1545-6. In applying the** ***Baris*** **logic, this case could not have been brought into federal court at the time of removal based upon Crown's removal petition that was totally absent of any allegation or facts to establish the amount in controversy exceeded $50,000 exclusive of interest and costs.**

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 96-3287

JOSEPH HARMON and MARILYN HARMON,

Plaintiffs-Appellants,

v.

OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 93 C 1102--David F. Hamilton, Judge.

Argued April 14, 1997--Decided June 2, 1997

Before FLAUM, EASTERBROOK, and EVANS, Circuit Judges.

EVANS, Circuit Judge. This is a products liability case stemming from injuries Joe Harmon suffered when his

foot was pinned between a wall and a forklift he had been driving. After Harmon and his wife sued the manufacturer and the company that serviced the forklift in Indiana state court, the manufacturer removed the case to the United States District Court for the Southern District of Indiana. After nearly 2 years of discovery the Harmons filed a motion to remand. Judge David Hamilton denied the motion and granted summary judgment for the defendants. This appeal followed.

Harmon had driven forklifts at the Cummins Engine Plant in Indianapolis, Indiana, for over 19 years. On the morning of July 29, 1991, he was operating a "Rider," an electric-powered "stand-up" forklift manufactured by Crown Equipment. Harmon used the Rider for 6 hours before lunch, took a break, and resumed operations in the afternoon. Throughout the day, the brakes on the Rider, which operate just the opposite as do brakes on a car (i.e., you have to press down on the pedal to disengage the brakes), worked properly. Shortly after resuming work, Harmon jumped off of the Rider to retrieve a box. As he was about to pick up the box, he saw the Rider coming toward him. Harmon tried to jump back onto the forklift, but his foot became pinned between the Rider and a concrete wall. He was unable to free himself and called for help. Although a number of co-workers came to his aid,they were unable to move the Rider until Harmon stepped on the brake pedal with his other foot and drove away from the wall.

In July 1993 the Harmons sued Crown and OKI Systems, the company that sold and serviced the Rider, in Indiana state court. Mr. Harmon's suit alleged Crown negligently designed the Rider and was strictly liable for selling a product that was defective due to inadequate warnings.

Mr. Harmon also asserted that OKI negligently maintained the forklift. Mrs. Harmon tacked on a loss of consortium claim, and both Harmons sought punitive damages.

On August 20, 1993, Crown filed a notice of removal and civil cover sheet in district court, alleging diversity jurisdiction existed under 28 U.S.C. sec.1332. The notice stated Crown and OKI were Ohio corporations and the Harmons were Indiana residents. However, the notice, which was no model to emulate, did not mention (1) the defendants' principal places of business; (2) the Harmons' Indiana citizenship (as opposed to their residence); or (3) that over $50,000 was at stake.

The Harmons did not immediately point out the omissions. Instead they engaged in discovery for almost two years. On August 9, 1995, however, after the district court dropped the case from the trial calendar and scheduled arguments on the defendants' motions for summary judgment--a subtle hint that the case might end in defeat without a trial--the Harmons suddenly "discovered" the omissions in the removal notice and sought remand back to state court.

Judge Hamilton denied the remand request and allowed Crown to amend its removal papers pursuant to 28 U.S.C. sec.1653. He pointed out that the Harmons did not claim that diversity did not exist or that the amount in controversy was less than $50,000. Rather, the Harmons merely asserted that Crown failed to demonstrate those facts to a reasonable probability. Judge Hamilton then found that the omissions at issue were "procedural defects" and explained that under 28 U.S.C. sec.1447(c), a motion to remand based on defects of this sort must be

made within 30 days of removal. Finally, Judge Hamilton concluded that the record amply demonstrated that federal jurisdiction was proper at the time of removal. He noted that the Harmons' answers to interrogatories made clear that they had incurred over $55,000 in medical expenses alone and that $80,000 in lost wages were suffered by the time the case was removed.

On the same day he denied remand, Judge Hamilton resolved a number of evidentiary issues and granted summary judgment for Crown. He concluded the Harmons had not shown that any act or omission by Crown proximately caused the accident. Approximately 10 months later and based on a slightly different record, Judge Hamilton granted summary judgment for OKI. He again reasoned that the Harmons could not show proximate cause. We review the district court's conclusion that it had jurisdiction and its decisions to grant summary judgment, de novo.

The Harmons first argue that Judge Hamilton erred by declining to remand the case and allowing Crown to amend its removal papers. The plaintiffs raise a bunch of arguments, all of which can be boiled down to two main themes. First, they contend the district court erred in finding that the omissions in Crown's notice were subject to sec.1447's 30-day limit for challenging procedural defects. Second, they contend the district court erred by using postremoval evidence (i.e., answers to interrogatories) to determine whether jurisdiction was proper at the time of removal. Throughout both arguments the Harmons remind us that Crown admitted (at a hearing on the issue) it did not know the exact amount in controversy when the case started because

Indiana rules bar plaintiffs from alleging a specific damage figure in their complaints.

Our first task is to pin down whether Crown's errors were procedural defects covered by sec.1447(c) or instead omissions which reveal the absence of subject matter jurisdiction. See In re Continental Cas. Co., 29 F.3d 292, 293 (7th Cir. 1994). The only circuit to consider this issue has found that sec.1447(c) covers any defects which do not go to the "question of whether the case could have been brought in federal district court." In re Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993). Applying that definition, the Fifth Circuit held that a defendant's failure to allege citizenship as opposed to residency (one of Crown's errors) constituted a procedural defect. As the court put it, although the party failed "to demonstrate diversity, the record discloses no dispute that it in fact existed." Id. (emphasis in original). That seems logical, and Crown's omissions--like those in Allstate--did not undermine jurisdiction (as would have been the case, for example, if the Harmons were really Ohio citizens living in Indiana).

The question is, then, what evidence may the district court use to figure out whether jurisdiction actually existed at the time of removal. The Harmons say district courts are limited to the evidence in the record when removal is sought. In support, they cite In re Shell Oil Co., 970 F.2d 355 (7th Cir. 1992) (per curiam), which held that plaintiffs cannot defeat federal jurisdiction simply by filing postremoval affidavits stating they are seeking less than the jurisdictional amount. In addition, our recent opinion in Chase v. Shop 'N Save Warehouse Foods, Inc., No. 96-2037, 1997 WL 149536 (7th Cir. Mar. 27, 1997), seems to lend some support to the Harmons' view. It

states, the "court, however, is limited to examining only that evidence of the amount in controversy that was available at the moment the petition for removal was filed." Id. at *3 (citing Shell). Finally, the plaintiffs refer us to Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995). In that case the defendant removed a suit based on diversity jurisdiction, but did not mention the amount in controversy. Although the plaintiff never objected, the Tenth Circuit raised the jurisdictional issue sua sponte and ordered remand even though the defendant's jurisdictional brief made clear that the amount in controversy was "well above" $50,000. Id. at 873.

It would not be prudent to strictly limit a district court as the Harmons suggest. First, neither Shell nor Chase dealt with an attempt to amend defective allegations of jurisdiction under sec.1653. Rather, in both cases, plaintiffs attempted to change the facts upon which jurisdiction was based. For example, in Shell the plaintiff tried to pull the rug out from under the district court by filing a postremoval stipulation that he would not seek to recover more than the jurisdictional amount. 970 F.2d at 356. The attempt to manipulate jurisdiction was even more transparent in Chase. In that case the plaintiff sued in state court, and the defendant removed. 1997 WL 149536 at *1. After her motion to remand was denied, the plaintiff voluntarily withdrew the suit. Two years later she refiled her complaint in state court, and the defendant once again removed the suit to federal court. The plaintiff moved to remand and, while her motion was pending, sought leave to amend her complaint to seek damages in an amount no greater than $49,999.99. We concluded that the district court correctly determined that federal jurisdiction was proper at the time of removal. Id. at *3.

Second, should a court really be barred from considering reliable evidence (which has been gathered during nearly 2 years of discovery) merely because the evidence was not in the record on the date of removal? The test should simply be whether the evidence sheds light on the situation which existed when the case was removed. Finally, although it appears the Harmons were trying to forum shop--they pulled the rip cord when the district court scheduled arguments on the summary judgment motions--what did they hope to accomplish? Any court would, we think, reach the same result reached by Judge Hamilton, whose opinion on the merits, for the reasons that follow, is unassailable.

The Harmons claim the district court impermissibly weighed the evidence and disregarded a dispute over whether the Rider was stopped when Harmon dismounted. They also claim the district court erred by failing to realize that proximate cause is always a jury question. Finally, they assert that an affidavit submitted by their expert, Jack Winsor, created a dispute over whether proximate cause had been shown.

Judge Hamilton properly concluded that any dispute over whether the Rider was still moving at the time of the accident was immaterial. If the Rider was stopped--as the evidence outlined in the judge's opinion seems to indicate--the Harmons cannot get past summary judgment unless they point to some evidence either that a defect caused it to spontaneously move or that a warning could have prevented the injury. They haven't done so. The brakes were working properly all morning and again after the incident. (Harmon had to disengage them, you recall, to drive away from the wall).

If, on the other hand, the forklift was still moving, no warning would have prevented the accident. The Harmons claim Crown should have warned them that a moving Rider can travel up to 8 feet after the brakes are engaged. However, Harmon admitted that he had been warned and knew not to jump off a moving forklift. He had used forklifts for 19 years and had to realize that a 7000 lb. vehicle would travel a short distance after the brakes were applied.

Finally, Winsor's affidavit does not get the Harmons over the hump. The Harmons rely on a single sentence, which opines that "failure to incorporate an adequate warning device and have adequate warnings on the rider . . . was a proximate cause of injury to Mr. Harmon." Without any evidence in the record to support that (legal) conclusion, Winsor's statement simply is not enough to get the Harmons' claims against Crown to the jury. See Buckner v. Sam's Club, Inc., 75 F.3d 290 (7th Cir. 1996) (summary judgment appropriate where, despite an expert's opinion to the contrary, the undisputed facts would not allow a reasonable jury to infer proximate cause).

The Harmons also allege OKI negligently maintained the Rider. They point out that OKI serviced the forklift monthly from November 1988 to December 1990 but not during the 6 months before the accident. The Harmons contend summary judgment was inappropriate against OKI because: (1) OKI's motion failed to contain a statement of undisputed facts as required by local rules; and (2) Judge Hamilton improperly struck Winsor's statement that the Rider had been used for 338 hours without being serviced and that service should be performed every 100 hours.

The lack of proximate cause is even more glaring in OKI's case. OKI submitted, in admissible form, the results of a postaccident inspection of the Rider's brakes. Everything checked out just fine. If the evidence was undisputed that the brakes worked properly both before and after the accident, how can the Harmons prevail on a negligent maintenance claim? Additionally, it was not an abuse of discretion for the judge to strike the expert's statement that the Rider had not been serviced for 338 hours. The assertion was based on an OKI employee's statement that OKI had not serviced the Rider--there was no evidence to suggest that Cummins had not checked over the forklift. (Although Judge Hamilton excluded the statement as hearsay, one of OKI's employees stated that Cummins agreed to take over maintenance of the Rider in December 1990). However, even if the affidavit were correct, it is meaningless in the absence of some evidence that the failure to perform maintenance led to worn or defective brakes. The Harmons have no such evidence.

Finally, Judge Hamilton rejected the Harmons' claim that the Southern District's local rule 56.1 knocked out OKI's brief in support of its summary judgment motion. The decision to keep the brief in the case was not an abuse of discretion. See Little v. Cox's Supermarkets, 71 F.3d 637, 640 (7th Cir. 1995) ("[I]t is clear that the decision whether to apply the rule strictly or to overlook any transgression is one left to the district court's discretion."). Rule 56.1 requires, among other things, a statement of undisputed material facts, and it's true that OKI didn't include one. However, the rule is designed to let the court and the opposing party know what legal and factual issues are on the table. Neither the court nor the Harmons could have been confused. OKI's brief was only 3 pages long, and the few assertions of fact in it were

found in a 3-page affidavit and a 14-page excerpt from a deposition. There was certainly no prejudice from this technical failure.

AFFIRMED.

Joseph HARMON and Marilyn Harmon, Plaintiffs,
v.
OKI SYSTEMS and Crown Equipment Corporation,
Defendants.

No. IP 93-1102-C.
United States District Court,
S.D. Indiana,
Indianapolis Division.

Oct. 10, 1995.

ENTRY ON PLAINTIFFS' MOTION TO REMAND

HAMILTON, District Judge.

Plaintiff Joseph Harmon was injured in an accident on the job on July 29, 1991. His left foot was pinned between a concrete wall and a forklift he had been driving. The forklift was manufactured by defendant Crown Equipment Corporation (Crown) and sold and maintained by defendant OKI Systems. Joseph Harmon and his wife Marilyn Harmon originally filed this product liability action in the Johnson Superior Court on July 28, 1993. On August 20, 1993, defendant Crown removed the case, asserting that this court has diversity jurisdiction under 28 U.S.C. § 1332. Nearly two years later, on August 9, 1995, plaintiffs filed their motion to remand.

Plaintiffs point out correctly that Crown's removal petition has three defects. First, the removal petition makes no explicit allegation that the amount in controversy exceeds $50,000 exclusive of interest and costs. Second, the removal petition says nothing about the corporate defendants' principal places of business, an

essential element of corporate citizenship for diversity purposes. Third, the removal petition says nothing about the plaintiffs' citizenship, as opposed to their residence. Although these elementary defects in Crown's removal papers would have required remand if plaintiffs' motion had been filed promptly, by waiting more than thirty days after the removal, plaintiffs waived these defects, and their motion to remand must therefore be denied.

Section 1447(c) of Title 28 of the United States Code provides in relevant part: "A motion to remand the case on the basis of any defect in removal procedure must be made wi n 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Because plaintiffs did not file their motion to remand within thirty days, the issue in terms of § 1447(c) is whether the defects in the removal petition are merely waivable "defects in the removal procedure" or instead undermine the court's jurisdiction over the subject matter. See *In re Continental Casualty Co.*, 29 F.3d 292, 293-95 (7th Cir.1994) (§ 1447(c) sets up these two categories of reasons for remand; parties may waive timeliness requirement).

Neither side has cited any decisions of the Seventh Circuit that would aid in classifying the specific defects in Crown's notice as either waivable procedural defects or fatal jurisdictional flaws. Crown relies on *In re Allstate Ins. Co.*, 8 F.3d 219 (5th Cir.1993), in which the Fifth Circuit granted a writ of mandamus to overturn a district court's immediate and *sua sponte* remand of a case in which the removal petition failed to allege the plaintiff's citizenship. Following its decision in *Baris v. Sulpicio*

Lines, 932 F.2d 1540, 1544 (5th Cir.1991), the Fifth Circuit said that a procedural defect under § 1447(c) refers to "any defect that does not go to the question of whether the case originally could have been brought in federal district court...." 8 F.3d at 221. "By this standard, Allstate's failure to allege, in its notice of removal, the plaintiff's citizenship at the time the original petition was filed constitutes a procedural, rather than jurisdictional, defect; although Allstate failed conclusively to *demonstrate* diversity, the record discloses no dispute that it in fact *existed.*" *Id.* (emphasis in original).

[1] There is no credible excuse for the defects in Crown's notice of removal. However, applying to this case the difference as articulated in *Allstate* between diversity jurisdiction being demonstrated and diversity jurisdiction actually existing, the court concludes that those defects are waivable procedural defects for purposes of § 1447(c). Plaintiffs do not actually claim they are or *178 have been citizens of any state other than Indiana. They do not dispute that both defendants are and have been Ohio corporations with their principal places of business in Ohio. Crown has come forward with evidence demonstrating both points, so these elements of diversity jurisdiction, in the terms of *Allstate,* clearly existed at the time of removal even if Crown failed to allege or demonstrate them at the time of removal.

[2] [3] The argument on the jurisdictional amount in controversy is a little more involved. Plaintiffs do not actually deny that the amount in controversy was less than $50,000 at the time of removal. They contend only that the jurisdictional amount in controversy was not demonstrated to a reasonable probability at that time.

Crown supports its removal now by relying on plaintiffs' interrogatory answers showing that, by the time of removal, Joseph Harmon had already incurred medical expenses alone in excess of $55,000, as well as lost wages by that time in excess of $80,000. In addition, both plaintiffs sought punitive damages in their state court complaint.

Plaintiffs argue that Crown cannot now establish the jurisdictional amount in controversy by relying on post-removal evidence, such as their interrogatory answers. Plaintiffs cite *In re Shell Oil Co.*, 970 F.2d 355 (7th Cir.1992), and this court's recent decision in *Reason v. General Motors Corp.*, 896 F.Supp. 829 (S.D.Ind.1995), which held that plaintiffs could not defeat removal by merelyclaiming, after removal, that they were seeking less than the jurisdictional amount. What is sauce for the goose is sauce for the gander, say plaintiffs, and if a plaintiff cannot defeat removal with a later disclaimer, a defendant should not be allowed to cure defective removals with post-removal evidence.

Plaintiffs' argument misconstrues *Shell Oil* and *Reason*. Both cases held that after a case is properly removed, a plaintiff cannot defeat removal by, in essence, changing the facts with a later disclaimer saying that the jurisdictional amount is not in controversy. In *Reason*, however, the plaintiffs could still raise the issue of the amount that was actually in controversy. Raising the issue is enough to impose on the party asserting federal jurisdiction the burden of coming forward with "competent proof" to establish at least a "reasonable probability" that the jurisdictional amount in controversy requirement was satisfied at the time of removal. 896 F.Supp. at 834 (citing *NLFC, Inc. v. Devcom*

Mid-America, Inc., 45 F.3d 231, 237 (7th Cir.1995); and *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366-67 n. 2 (7th Cir.1993)). In fact, in *Reason* this court remanded the case, but did so without relying at all on plaintiffs' post-removal disclaimer. The court relied instead on the defendant's failure to come forward with evidence sufficient to show a reasonable probability that the amount in controversy exceeded $50,000 at the time of removal.

Plaintiffs' late motion to remand in this case was sufficient to require Crown to meet that same burden here. The issue is whether such a reasonable probability existed at the time of the removal. Nothing in *Shell Oil, Reason, NLFC,* or *Shaw* prevents the party asserting federal jurisdiction from relying on evidence generated after the removal. Of course, it would not be enough to show that the amount in controversy was greater than $50,000 after removal, but post-removal admissions by parties opposing federal jurisdiction may be considered if they are probative of the amount in controversy at the time of removal. [1]

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[1] Defendant OKI Systems filed a document designating the deposition testimony of Dr. George Launey and all exhibits as evidence of the damages claimed by both plaintiffs. Plaintiffs movedto strike this designation as untimely and irrelevant. It is untimely. Whether it is relevant is unclear because OKI Systems designated the entire transcript and all exhibits without any indication of which portions might be relevant or why. The court will not undertake its own unguided search of the deposition and exhibits for relevant information. See *Northwestern Nat. Ins. Co. v. Baltes,* 15 F.3d 660, 662 (7th Cir.1994). OKI Systems' designation is untimely and will therefore be stricken.

In this case, Crown has satisfied its burden of showing a reasonable probability that the amount in controversy at the time of removal exceeded $50,000 for each plaintiff's claim. Joseph Harmon's medical expenses incurred and lost wages accrued by the time of removal *179 each exceeded the amount in controversy requirement. He also sought compensatory damages for pain and suffering, as well as punitive damages. Marilyn Harmon's claim for loss of consortium is less capable of exact proof, but in view of the magnitude of Mr. Harmon's injuries, the recovery being claimed by plaintiffs and the assertion of claims for punitive damages, there was a reasonable probability at the time of removal that her claims also exceeded the jurisdictional amount in controversy. [2]

When Congress amended § 1447(c) in 1988 to allow waiver of procedural defects, the House committee report explained:

> So long as the defect in the removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts

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[2] The court therefore need not answer in this case the question raised but not answered in *Reason:* whether supplemental jurisdiction in a diversity case can include the separate and distinct claim of a plaintiff who cannot satisfy the jurisdictional amount in controversy on his or her own. See 896 F.Supp. at 835, at n. 4 (noting conflict in district court decisions).

> that each have subject matter jurisdiction. There is some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means for forum shopping if the litigation should take an unfavorable turn.

H.R.Rep. No. 889, 100th Cong., 2d Sess. 72 (1988), *reprinted in* 1988 U.S.Code Cong. &Ad.News 5982, 6033. These concerns are relevant here. The defects in the original removal petition should have been evident for nearly two years before the remand motion was filed. Yet the motion was filed only a few days after the court vacated the trial setting and scheduled oral argument on Crown's motion for summary judgment. After the 1988 amendment to § 1447(c), mere defects in allegations no longer give a party who later senses trouble in federal court a kind of emergency ejection device to escape the forum.

Nevertheless, in support of their motion to remand, plaintiffs rely on the Tenth Circuit's decision in *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir.1995), which squarely supports their position. In *Laughlin*, the plaintiff's original state court pleading alleged damages for each of two claims "in excess of $10,000." The defendant removed but, like Crown here, its removal notice did not refer to an amount in controversy. The plaintiff did not object to removal. The question of jurisdiction was not raised until the Tenth Circuit raised and decided it on appeal. The defendant apparently set forth facts in its appellate brief alleging that the amount in controversy was satisfied at the time of the removal. Although the court did not address § 1447(c), it implicitly treated the failure to include any allegation of a jurisdictional amount in the removal petition as a

jurisdictional defect that could not be waived or corrected. 50 F.3d at 873.

This court cannot follow *Laughlin* for two reasons. First, in *Laughlin* the Tenth Circuit expressly disagreed with the Seventh Circuit's decision in *Shaw v. Dow Brands*, 994 F.2d at 366-68. This court is in the Seventh Circuit and must follow controlling Seventh Circuit decisions. *Shaw* instructed that where a plaintiff does not raise a challenge to the jurisdictional amount in controversy, but the court raises the issue itself, the court should require the removing defendant to come forward with evidence to show the required amount is actually in controversy. 994 F.2d at 366 n. 2. The Seventh Circuit therefore rejected the *Laughlin* approach of immediate and *sua sponte* remand. In this case, plaintiffs have raised the issue, but the *Shaw* approach of giving the party seeking a federal forum the opportunity to come forward with evidence to support jurisdiction applies here, and this court must follow Seventh Circuit law. Second, the Tenth Circuit in *Laughlin* never discussed the possible application of 28 U.S.C. § 1447(c) and the plaintiff's apparent waiver of any defects in removal procedure. This court agrees with the *Laughlin* court in that the basis for the court's jurisdiction must appear in the record, but § 1447(c) should permit the party asserting federal jurisdiction *180. to make that proof at any time prior to judgment if no challenge is raised earlier. [3]

[3] After argument on the motion to remand, Crown filed a motion to amend its defective removal papers pursuant to 28 U.S.C. § 1653, which authorizes amendment of "defective allegations of jurisdiction." The amendment Crown seeks is incorporation of all evidence submitted by Crown and OKI Systems in opposition to remand. Such evidence need not be

CONCLUSION

The jurisdictional controversy in this case was caused by a defendant's remand papers that omitted elementary allegations. This failure has created an avoidable and completely unnecessary cloud of uncertainty over the entire case. However, the plaintiffs waived their objections to these defects in the removal procedures. Plaintiffs' motion to remand this case to the Johnson Superior Court is DENIED.

So ordered.

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submitted as part of the removal papers. It is sufficient in this case to amend the removal petition to include the assertions that, at the time of removal: (a) the amount in controversy for each plaintiff's claim exceeded $50,000, (b) each corporate defendant had its principal place of business in Ohio, and (c) plaintiffs are both citizens of Indiana. The court grants the motion to amend to the extent that Crown's removal petition should be deemed amended to include these three allegations. See *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1074 (7th Cir.1992) (court willing to accept amended jurisdictional allegations even after oral argument on appeal); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 70 n. 1 (7th Cir.1992) (same).

Supreme Court, U.S.
FILED
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No. 97-402

In The

Supreme Court of the United States

October Term, 1996

JOSEPH HARMON and MARILYN HARMON,

Petitioners,

vs.

OKI SYSTEMS, INC. and CROWN EQUIPMENT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CROWN EQUIPMENT CORPORATION

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QUESTIONS PRESENTED

Crown Equipment Corporation ("Crown") does not accept Harmons' statement of Questions Presented set forth in Harmons' Petition for Writ of Certiorari ("Petition"). Instead, the following statement of questions is presented.

1. Did subject matter jurisdiction under 28 U.S.C. § 1332(a) exist at the time Crown removed this action from Indiana state court to the district court?

2. Did Harmons waive any defect in Crown's Removal Papers by their failure to file a Motion to Remand within the thirty (30) day period prescribed by 28 U.S.C. § 1447(c)?

3. In assessing its subject matter jurisdiction under 28 U.S.C. § 1332(a), did the district court have the discretion to consider jurisdictional facts not contained in the Removal Papers?

PARTIES TO THE PROCEEDINGS

The Petition accurately lists the parties to the proceeding. There are no parent companies or nonwholly owned subsidiaries of Crown Equipment Corporation.

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I

OPINIONS BELOW

The Petition correctly cites the opinions of the appellate court and district court in this action. Crown adopts the reproduction of these opinions as set forth at App. 1a and App. 11a, respectively, of the Petition.

STATUTES INVOLVED

28 U.S.C. § 1332(a) and 28 U.S.C. § 1447(c) are correctly set forth in Harmons' statement of Statutes Involved. In addition, the following citations are pertinent:

Article III -- The Judiciary -- Section 2, which states in pertinent part:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies . . . between Citizens of different States. . . .

28 U.S.C. § 1441(a) -- Actions removable generally -- which states:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division

> embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1446(a) -- Procedure for Removal -- which states:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1653 -- Amendment of pleadings to show jurisdiction -- which states:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rule 8(A), Indiana Rules of Trial Procedure -- Claims for Relief -- which states:

> (A) Claims for Relief. To state a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, a pleading must contain:
>
> > (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and

> (2) a demand for the relief to which the pleader deems entitled. Relief in the alternative or of several different types may be demanded. However, in any complaint seeking damages for personal injury or death, or seeking punitive damages, no dollar amount or figure shall be included in the demand.

STATEMENT OF THE CASE

Harmons' Statement of the Case is neither accurate nor complete. The following is submitted as a more accurate statement of the case.

On July 28, 1993, Harmons filed a Complaint in the Johnson Superior Court No. 1, State of Indiana ("*Harmon*"), alleging claims against Crown based on negligent product design and strict liability, and against OKI Systems, Inc. ("OKI") on a theory of negligent maintenance (Harmons App. A, 2a, 3a; B, 11a).

Crown timely removed the case to federal court on August 20, 1993 (Harmons App. B, 11a). Harmons' Statement of the Case alleges that "during discovery" the Harmons learned about the defects in Crown's Notice of Removal (Petition, p. 3). This is false. The alleged defects at issue in this case were apparent from the face of the Notice of Removal and could have been identified by the Harmons upon receiving service of the Removal Papers in August, 1993 (Crown App. A, 1a, 2a, 3a). Discovery occurring after service of the Removal Papers had no bearing upon Harmons' failure to read the Removal Papers or to

challenge the alleged defects in a timely manner as required by 28 U.S.C. § 1447(c).

Harmons' Petition correctly states that Crown's Notice of Removal did not expressly allege an amount in controversy under 28 U.S.C. § 1332(a) (Petition, p. 3). However, Crown's Notice of Removal did state that the action was one "over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332" (Harmons App. A, 3a; Crown App. A, 2a). In addition, the Civil Cover Sheet, filed as part of the Removal Papers, stated that jurisdiction was predicated upon 28 U.S.C. § 1332 (Crown App. B, 7a). Thus, by reference, Crown's Removal Papers alleged the jurisdictional amount component of 28 U.S.C. § 1332 at the time it removed this action to federal court.

On September 28, 1994, Crown filed a Motion for Summary Judgment on all pending issues. Yet, Harmons waited almost two (2) years after removal, until August 9, 1995, to file a Motion to Remand (Harmons App. A, 3a). Harmons' Motion to Remand failed to explain why Harmons did not remand the action within thirty (30) days, even though the alleged defects were apparent upon the face of the Notice of Removal, or why Harmons waited almost two (2) years to request a remand of the action.

On September 18, 1995, the district court held a hearing on Harmons' Motion to Remand and Crown's Motion for Summary Judgment (Crown App. D, 35a-37a). In opposition to remand, Crown submitted information to the Court establishing uncontroverted evidence that, at the time of removal, the Harmons were citizens of Indiana, Crown and OKI were corporate citizens of Ohio, and the amount in controversy greatly exceeded $50,000, exclusive of interest and costs (Harmons App. A, 3a, 4a; B, 13a, 14a). Indeed,

even though asked point blank by the district court about jurisdictional amount, the Harmons flatly refused to state that their claim, at the time of removal, was less than $50,000 (Harmons App. B, 13a; Crown App. D, 35a-37a).

The record before the district court also established the following facts relevant to the amount in controversy: Harmons' Complaint described a very serious work-related injury, including "personal injuries, physical and mental pain and suffering, medical expenses, lost wages, and other pecuniary damages" (Crown App. A, 4a)[1]; Harmons' Interrogatory Answer No. 10 stated that Harmons' medical expenses, predating removal, exceeded $55,000 (Crown App. C, 11a-16a); Harmons' Interrogatory Answer No. 22 provided that Harmons had incurred expenses for wheelchairs and appliances in the sum of $2,100.68 (Crown App. C, 18a-22a); Harmons' Interrogatory Answer No. 23(d) provided that the Harmons had suffered lost wages in the amount of $80,972.00 (Crown App. C, 22a); in the Case Management Plan, filed February 24, 1994, Harmons identified special damages in the approximate sum of $65,000.00 (Crown App. C, 25a); and Harmons' attorney letter, dated July 1, 1994, stated special damages in the amount of $157,396.03, and a settlement demand on behalf of the Harmons in the amount of $1.8 million (Crown App. C, 28a-30a). In addition, Harmons requested punitive damages (Harmons App. A, 3a; Crown App. A, 4a).

On the issue of diversity of citizenship, the district court was presented with the following evidence: the

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[1]Rule 8(A), Indiana Rules of Trial Procedure, prohibits the plaintiff from alleging a specific dollar amount when claiming personal injury or punitive damages.

Harmons reside at 200 S. Pleasant Street, Edinburgh, Indiana, and have resided in Indiana continuously for over twenty (20) years (Crown App. C, 10a). The Harmons admitted at the hearing on their Motion to Remand that they were citizens of Indiana at the time of removal (Crown App. D, 35a, 36a). OKI is an Ohio corporation (Crown App. C, 31a, 32a) and maintains its principal place of business and corporate headquarters in Cincinnati, Ohio (Crown App. C, 31a, 32a). OKI has never been incorporated or maintained its principal place of business in Indiana (Crown App. C, 32a). Similarly, Crown is an Ohio corporation and maintains its principal place of business and corporate headquarters in New Bremen, Ohio (Crown App. C, 33a, 34a). Crown has never been incorporated or maintained its principal place of business in Indiana (Crown App. C, 34a). Finally, the Civil Cover Sheet, filed as part of the Removal Papers, stated that Harmons were citizens of Indiana, and that Crown was incorporated and maintained its principal place of business in another state (Crown App. B, 7a).

On September 20, 1995, and prior to entry of summary judgment, Crown filed a Motion to Amend its Removal Papers under 28 U.S.C. § 1653. The proposed Amendment supplemented Crown's Notice of Removal by stating the citizenship of each party and an amount in controversy in excess of $50,000, exclusive of interest and costs.[2] The district court granted Crown's Motion and

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[2]Although the district court found Crown's failure to allege a specific amount in controversy was a procedural defect, Crown intended to satisfy this requirement by expressly referencing 28 U.S.C. § 1332 in the Notice of Removal. In this regard, Crown stated the federal court has "original jurisdiction pursuant to 28 U.S.C. § 1332." Thus,

entered Summary Judgment for Crown on October 10, 1995 (Harmons App. A, 4a). The district court later entered Summary Judgment for OKI on August 13, 1996 (Harmons App. A, 4a).

On the same date the district court granted Crown's Motion for Summary Judgment, it also denied Harmons' Motion to Remand. In so doing, the district court found that the requirements for subject matter jurisdiction under 28 U.S.C. § 1332(a) -- namely, diversity of citizenship and amount in controversy -- clearly existed at the time of removal (Harmons App. B, 13a, 14a). The district court determined that the defects in Crown's Notice of Removal were procedural, not jurisdictional, and that Harmons had waived these defects by failing to remand the action within thirty (30) days of removal as required by 28 U.S.C. § 1447(c) (Harmons App. B, 19a). Finally, the district court determined that a federal court may consider probative post-removal information in assessing the existence of subject matter jurisdiction at the time of removal (Harmons App. B, 15a), that 28 U.S.C. § 1653 authorizes the amendment of "defective allegations of jurisdiction" (Harmons App. B, 18a, 19a), and that a federal court may consider matters outside the Complaint and Notice of Removal in deciding whether to grant a motion to remand (Harmons App. B, 15a).

In deciding the Motion to Remand, the district court considered and rejected the Tenth Circuit opinion of *Laughlin v. Kmart Corporation*, 50 F.3d 871 (10th Cir. 1995),

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Harmons' allegation that Crown's Notice of Removal failed to make any reference to the amount in controversy requirement under § 1332 is incorrect.

certiorari denied, 116 S.Ct. 174 (1995). The district court rejected *Laughlin*, in significant part, because *Laughlin* did not discuss the application of 28 U.S.C. § 1447(c) (suggesting that *Laughlin* was decided in error) (Harmons App. B, 18a).

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's order denying Harmons' Motion to Remand; its finding that the requirements for subject matter jurisdiction under 28 U.S.C. § 1332(a) existed at the time of Crown's removal; and its determination that a district court may consider matters outside the Notice of Removal if it "sheds light on the situation which existed when the case was removed" (Harmons App. A, 7a). The appellate court also concluded that the Harmons were guilty of "forum shopping" and noted that the Harmons did not file the Motion to Remand until it had become apparent that they were likely to lose the case on summary judgment -- almost two (2) years after Crown's removal (Harmons App. A, 2a, 7a).

ARGUMENT OPPOSING HARMONS' PETITION

Harmons allege that this case will impact every federal case in which jurisdiction is based upon 28 U.S.C. § 1332(a), and that a conflict exists between the Seventh Circuit and other federal circuit courts (Petition, p. 6). These allegations are without merit and, accordingly, Harmons' Petition for Writ of Certiorari should be denied.

Harmons first incorrectly assert that this action will impact every case in which jurisdiction is based upon 28

U.S.C. § 1332(a) (Petition, p. 6). Indeed, *Harmon* exists only because Crown's Notice of Removal failed to allege certain matters under 28 U.S.C. § 1332(a), and because the Harmons failed to challenge removal within thirty (30) days as required by 28 U.S.C. § 1447(c). There are no federal cases, other than *Harmon,* in which this unique combination of pleading failures has been discussed by a federal court. Thus, *Harmon* is rare in its procedural context and the Seventh Circuit's opinion affirming federal jurisdiction will have little, if any, impact on future federal cases predicated upon diversity jurisdiction. Supreme Court Rule 10 does not contemplate review under these circumstances.

Importantly, this is an action in which federal jurisdiction has been proven by uncontroverted evidence. The district court conducted an independent examination of its jurisdiction after Harmons filed a Motion to Remand, and found that both diversity of citizenship and jurisdictional amount existed at the time of removal. Harmons have never denied these jurisdictional facts, and do not allege that the district court's evaluation of those facts was incorrect.

Harmons next allege that a split exists in the federal circuits on whether the defendant must affirmatively plead and prove the amount in controversy in the Notice of Removal (Petition, p. 6). Harmons believe that a defendant's failure to plead jurisdictional amount in this manner automatically defeats federal subject matter jurisdiction, even though the record is uncontroverted that the requirements of 28 U.S.C. § 1332(a) existed at the time of removal. Also, incredibly, Harmons suggest that a federal court has no discretion to consider evidence outside the Complaint and Notice of Removal when assessing its jurisdiction, and that a court's decision to consider such evidence constitutes reversible error.

In support of their position, Harmons allege that the Seventh Circuit's decision in *Harmon* conflicts with the Tenth Circuit's opinion in *Laughlin*, 50 F.3d 871 (Petition, pp. 6-7). However, because of the factual and procedural differences between *Harmon* and *Laughlin*, Harmons' allegation of conflict is without merit.

First, *Harmon* is based on the Seventh Circuit's finding that the Harmons waived their right to challenge defects in Crown's Notice of Removal by failing to timely file a Motion to Remand under 28 U.S.C. § 1447(c). *Laughlin* did not discuss, and apparently did not even consider, the issue of waiver under 28 U.S.C. § 1447(c). Had it done so, it could have affirmed jurisdiction because Laughlin had clearly waived the pleading defect by failing to object within the thirty (30) day period allowed by 28 U.S.C. § 1447(c).

Second, in *Laughlin*, the parties failed to raise the issue of jurisdiction before entry of judgment; in fact, jurisdiction was never challenged by remand in the district court. In contrast, in *Harmon*, jurisdiction was challenged before judgment by Harmons' Motion to Remand and the district court fully investigated the existence of subject matter jurisdiction before making an entry of summary judgment. This factual distinction is critical because the appellate court in *Laughlin* did not have a record establishing the federal court's subject matter jurisdiction, whereas, in *Harmon*, the Seventh Circuit had an uncontroverted record establishing that the requirements for subject matter jurisdiction under 28 U.S.C. § 1332(a) existed at the time of removal.

This absence of a record on appeal was highlighted by the Tenth Circuit in its statement that jurisdiction should bedenied "where such jurisdiction does not affirmatively

appear in the record." *Laughlin*, 50 F.3d at 873. Such a record existed in *Harmon*. Had a record been created in the district court in *Laughlin*, the Tenth Circuit would only have been required to review the district court's finding, based upon the record, that jurisdiction existed at the time of removal. However, because no record existed on appeal, the Tenth Circuit had no choice but to remand the action for lack of jurisdiction.

Third, *Laughlin* rejected K-Mart's attempt to satisfy the jurisdictional amount requirement by referencing 28 U.S.C. § 1441 in the Notice of Removal. The appellate court based its rejection on the fact that § 1441 does not mention jurisdictional amount and, therefore, there is no jurisdictional statement in the statute to incorporate by reference. *Laughlin*, 50 F.3d 873. In contrast, both Crown's Notice of Removal and Civil Cover Sheet expressly stated that original jurisdiction exists pursuant to 28 U.S.C. § 1332. Because § 1332(a) affirmatively provides that diversity jurisdiction requires an "amount in controversy in excess of $50,000, exclusive of interest and costs", under the dictum in *Laughlin*, Crown's reference to § 1332 should satisfy the requirement for pleading this element of subject matter jurisdiction.

Fourth, in *Laughlin*, the removing party did not correct the defects in the removal papers prior to judgment. Thus, when the appellate court decided the issue of jurisdiction, *sua sponte*, the removal papers were still defective and the record otherwise failed to establish federal jurisdiction. In contrast, Crown amended the Notice of Removal prior to entry of judgment pursuant to 28 U.S.C. § 1653. This amendment, together with an uncontroverted record establishing jurisdiction at the time of removal, formed the basis of the Seventh Circuit's decision to affirm

the district court. Such facts were absent in *Laughlin*. Moreover, although *Laughlin* is silent on how the Tenth Circuit would decide a motion by the defendant to amend the Notice of Removal to allege jurisdictional amount, under 28 U.S.C. § 1653, when the Removal Papers allege generally that "original jurisdiction" of the Court exists pursuant to 28 U.S.C. § 1332, nothing in the opinion suggests that such a motion would be denied.

Finally, a recent opinion from the Tenth Circuit, *Unrein v. Citgo Petroleum Corp.*, 1997 WL 18181 (D.Kan. January 10, 1997), has approved a federal court's discretion to review matters outside the Notice of Removal in assessing federal court jurisdiction. In that action, the defendant removed to federal court a complaint for declaratory judgment. The notice of removal alleged diversity of citizenship and that jurisdictional amount exceeded $50,000. The plaintiff's motion to remand challenged federal jurisdiction on grounds that jurisdictional amount was not specifically proven in the Notice of Removal. The defendant submitted an affidavit in support of removal setting forth the defendant's estimation of the potential economic impact resulting from plaintiff's claim. The District Court of Kansas rejected plaintiff's challenge and affirmed the discretion of a federal court to consider matters outside the Notice of Removal in assessing its jurisdiction:

> [A] plaintiff's failure to allege an amount in controversy does not necessarily preclude federal jurisdiction. When a determination cannot be made from the complaint, the court may look to the notice of removal or to affidavits submitted by the parties, or it may independently assess the monetary value of the claim. The defendant as the removing party has the burden of showing federal jurisdiction. Under the

> circumstances presented here "[d]ismissal is appropriate only if it appears to a 'legal certainty' that the jurisdictional amount is not met." The court concludes that the affidavit submitted by Citgo is sufficient to show that the amount in controversy exceeds $50,000." (citations omitted)

Unrein, 1997 WL 18181.

Because of the foregoing significant differences in the factual and procedural history of the *Harmon* and *Laughlin* cases, as well as the Tenth Circuit district court's holding in *Unrein*, there is no credible basis for Harmons' claim that a split of authority exists between the Circuits on this jurisdictional issue. Had *Laughlin* dealt with the same history and facts as presented in *Harmon* (namely, a defect in the removal pleading, a finding that plaintiff had waived the defect by failing to timely remand the action, a pre-judgment amendment by the defendant correcting the pleading defect, and a pre-judgment assessment by the district court that subject matter jurisdiction did exist at the time of removal), then a claim of conflict might exist. This is not the case. The *Harmon* and *Laughlin* decisions are simply too procedurally different to support Harmons' contention that the cases are in conflict. Absent a true and important conflict, grounds for granting a Petition for Writ of Certiorari do not exist under Supreme Court Rule 10(a).

Harmons next incorrectly allege that there is a split within the Seventh Circuit on whether the court may consider matters outside the removal papers in assessing its subject matter jurisdiction (Petition, p. 7). Specifically, Harmons allege that the Seventh Circuit's decision in *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424 (7th Cir. 1997) is at odds with its opinion in *Shaw v. Dow Brands*, 994 F.2d

364 (7th Cir. 1993). First, intra-circuit conflicts, to the extent they exist, do not provide grounds for a writ of certiorari under Supreme Court Rule 10.

Second, *Shaw* and *Chase* are inapposite to the *Harmon* case. In this regard, *Shaw* is a case in which the plaintiff attempted to manipulate federal jurisdiction by stating his case was worth less than $50,000, when he had earlier stated his case was worth more than $50,000. *Chase* is a case in which the plaintiff voluntarily withdrew her action after a motion to remand was denied. Subsequently, she refiled her complaint in state court, and when the defendant removed, she sought leave to amend her complaint to allege damages no greater than $49,999.99. Because in both cases, the record established that jurisdictional amount existed at the time of removal, the Seventh Circuit held that a plaintiff could not manipulate federal jurisdiction by reducing the damages claim after removal.

These are not the facts of *Harmon*. Unlike *Shaw* and *Chase*, Harmons have not attempted, post removal, to defeat jurisdiction by alleging that Harmons' damages claim is less than $50,000. *Harmon* is based on jurisdictional facts as they existed at the time of removal (not facts created by the plaintiff after removal). In addition, neither *Shaw* nor *Chase* dealt with the issue of an amendment under 28 U.S.C. § 1653 or a plaintiff's waiver of defects in removal papers under 28 U.S.C. § 1447(c). Thus, *Shaw* and *Chase* are inapposite to the facts in *Harmon* and provide no basis for this Court to grant Harmons' Petition for Writ of Certiorari.

Harmons next argue that the Seventh Circuit opinion in *Harmon* is contrary to the United States Supreme Court opinion in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Harmons' reliance on *St. Paul* is

erroneous as *St. Paul* is not in conflict with Seventh Circuit case law. Indeed, *St. Paul* involved an action in which the Seventh Circuit refused to consider an appeal because the district court had entered judgment in an amount less than the $3,000 amount in controversy requirement. The Supreme Court stated that this ruling was in error and that the "record" established that jurisdictional amount existed at the time of removal. Moreover, *St. Paul* involved a jurisdictional challenge based on events occurring subsequent to removal (a judgment entered for less than the federal jurisdictional amount). In contrast, *Harmon* does not involve a change of facts subsequent to removal, rather, the district court based its ruling solely on the jurisdictional facts that existed at the time of removal.

Harmons state that *St. Paul* stands for the principle that "amount in controversy is determined on the basis of the record at the time the petition for removal is filed" (Petition, p. 8). This is a mischaracterization of the *St. Paul* holding (indeed, this principle is not even stated at pages 291-293 of the opinion as alleged by the Harmons). Thus, *St. Paul* is not contrary to the Seventh Circuit's decision in *Harmon,* and provides no credible support for Harmons' Petition for Writ of Certiorari.

Finally, the Harmons improperly allege that *Harmon* violates the principle of federal and state comity (Petition, pp. 8-9). Quite the contrary, the Seventh Circuit has affirmed the jurisdictional requirements of 28 U.S.C. § 1332(a), has stated that these requirements must be proven in the record and exist at the time of removal, and has affirmed that a plaintiff must timely challenge procedural defects in the removal papers under 28 U.S.C. § 1447(c) in order to avoid a waiver of those defects. In short, the Seventh Circuit has soundly enforced the requirements of federal law

and the relationship between state and federal courts when an action is removed to federal court. In no manner has the Seventh Circuit's decision altered or adversely impacted the principle of comity.

I. Subject Matter Jurisdiction Under 28 U.S.C. § 1332(a) Existed at the Time Crown Removed This Action to Federal Court.

The district court correctly determined, based on its review of the record, that the requirements for jurisdiction under 28 U.S.C. § 1332(a) existed at the time of removal. As noted in the district court's Entry of October 10, 1995, on the issue of diversity of citizenship:

> Plaintiffs do not actually claim they are or have been citizens of any state other than Indiana. They do not dispute that both defendants are and have been Ohio corporations with their principal places of business in Ohio. Crown has come forward with evidence demonstrating both points, so these elements of diversity jurisdiction, in terms of *Allstate*, clearly existed at the time of removal even if Crown failed to allege or demonstrate them at the time of removal.

(Harmons App. B, 13a).

On the issue of amount in controversy, the district court correctly concluded that the record established the Harmons had incurred damages exceeding $50,000, exclusive of interest and costs, at the time of removal. On this point, the district court stated: "by the time of removal, Joseph Harmon had already incurred medical expenses alone in excess of $55,000, as well as lost wages by that time in excess of $80,000. In addition, both plaintiffs sought

punitive damages in their state court complaint." (Harmons App. B, 14a). Importantly, the Harmons have never alleged that the amount in controversy is less than $50,000, even though they have had repeated opportunities to do so (Harmons App. B, 13a; Crown App. D, 35a, 36a).

Thus, the record presented to the district court, prior to entry of judgment, established that each prerequisite for diversity jurisdiction under 28 U.S.C. § 1332(a) existed at the time Crown removed the action to federal court.

II. The Harmons Waived Any Defect in Crown's Notice of Removal by Their Failure to File a Motion to Remand Within the Thirty (30) Day Period Prescribed by 28 U.S.C. § 1447(c).

The district court correctly determined that Harmons' Motion to Remand was filed untimely under the requirements of 28 U.S.C. § 1447(c). Indeed, even though Harmons knew or should have known of the alleged pleading defects at the time of Crown's removal in August 1993, the Harmons waited almost two (2) years, until August 9, 1995, to challenge federal court jurisdiction (Harmons App. A, 3a). As noted by the appellate court, the Harmons filed their motion after it had become apparent that they might lose their case on summary judgment (Harmons App. A, 3a).

The first sentence of 28 U.S.C. § 1447(c) requires that "[a] Motion to Remand the case on the basis of any defect in removal procedure must be made within thirty (30) days after the filing of the Notice of Removal under section 1446(a)." *Roe v. O'Donohue*, 38 F.3d 298, 302 (7th Cir. 1994) ("[R]emoval procedures are deemed adequate save to the extent they are challenged during the first 30 days.").

> A removed case normally and in the present instance is a case within the original jurisdiction of the federal district court. If the plaintiff does not object to the removal it is as if he had refiled the case in the federal District Court. (citation omitted) He cannot be permitted to change his mind later and toss the case back to the state court.

Johnson v. Burken, 930 F.2d 1202, 1206 (7th Cir. 1991).

The case law construing 28 U.S.C. § 1447(c) distinguishes between a defect in the removal procedure and a district court's lack of subject matter jurisdiction. In this regard, the former is waivable, whereas the latter is not. *In Re Matter of Continental Casualty Co.*, 29 F.3d 292, 294 (7th Cir. 1994) (procedural defects in removal must be timely asserted or they are waived and afford no basis for remand).

Section 1447(c) applies to all motions to remand except those in which the court actually lacks subject matter jurisdiction. 14A Wright and Miller, *Federal Practice and Procedure*, 3739, at 286 (Supp. 1996).

> [A]ll matters concerning the removal of the case to the federal court are capable of waiver...[Section] 1447(c) refers to any defect that does not involve the inability of the federal District Court to entertain the suit as a matter of its original subject matter jurisdiction.

Baris v. Sulpicio Lines, Inc., 932 F.2d 1540, 1544-1545 (5th Cir. 1991), certiorari denied, 502 U.S. 963 (1991).

The term "defect in removal procedure" under 28 U.S.C. § 1447(c) includes any deficient or omitted jurisdictional allegation. Such deficiencies or omissions will not defeat jurisdiction, after the thirty (30) day period, unless the record demonstrates that subject matter jurisdiction does not, in fact, exist. *In Re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993); *In Re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991), 112 S.Ct. 914 (1991). Thus, if the federal court determines that citizenship of the parties, in fact, was not diverse at the time of removal, the court must remand the action, even though the plaintiff does not assert the issue until after the thirty (30) day period under 28 U.S.C. § 1447(c).

This result is consistent with the Congressional intent underlying 28 U.S.C. § 1447(c) which protects a plaintiff's right to oppose a defectively pleaded removal (by giving plaintiff a specific period of time to oppose removal), while also protecting the court's interest in having the case proceed uninterrupted when the record demonstrates that federal court subject matter jurisdiction existed at the time of removal.

> So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuffling a case between two courts that each have subject matter jurisdiction.

H.R. Report No. 889, 100th Cong., 2d Session 72, reprinted in 1988 U.S. Code Cong. & Admin. News 5982, 6033. The House Committee comments are underscored by Wright and Miller who state: "[Section 1447(c)] will prevent a party who is aware of a defect in removal procedure from using the

defect as insurance against later unfavorable developments in federal court." 14A Wright and Miller, *Federal Practice and Procedure*, 3739, at 286 (Supp. 1996).

In *Allstate*, 8 F.3d 219, the district court, *sua sponte*, remanded an action because Allstate's Notice of Removal had only alleged the residence, not the citizenship, of the plaintiff. The appellate court reversed the district court and stated that a "defect in removal procedure" under 28 U.S.C. § 1447(c) means "any defect that does not go to the question of whether the case originally could have been brought in District Court." *Allstate*, 8 F.3d at 221, citing *Baris*, 932 F.2d at 1544. The appellate court concluded that Allstate's failure to allege the plaintiff's citizenship constituted a "procedural, rather than jurisdictional, defect", and that the plaintiff's Motion to Remand should have been denied. *Allstate*, 8 F.3d at 221.

Importantly, there is no Constitutional, Congressional, or public policy consideration which warrants giving the amount in controversy requirement under 28 U.S.C. § 1332(a) a higher standing than the requirement for diversity of citizenship (indeed, only diversity of citizenship is required by Article III, Section 2, of the United States Constitution). Thus, if the failure to plead citizenship, as opposed to residence, is a procedural defect subject to waiver under 28 U.S.C. § 1447(c), as held in *Allstate*, then the same result must obtain to a defect in pleading amount in controversy.

Next, the second sentence in 28 U.S.C. § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Under this provision, the district court has an affirmative duty to review

the record and assess its subject matter jurisdiction. This duty is discussed fully in *In Re Matter of Continental Casualty Co.*, 29 F.3d 292, 294 (7th Cir. 1994).

In order to affirm federal jurisdiction, the district court must find that the action could have been commenced in federal court in the first instance. *Baris*, 932 F.2d at 1544-1545. This requirement simply means that the elements for jurisdiction under 28 U.S.C. § 1332(a) must actually exist at the time of removal. In making its assessment, the district court is not limited to the removal papers, but may conduct an independent investigation and, in so doing, it may consider the entire record. See *United Food and Commercial Worker's Union, Local 919, AFL-CIO v. Centermark Properties, Meridian Square Inc.*, 30 F.3d 298 (2nd Cir. 1994) (appellate court remanded action to district court to determine amount in controversy after finding record inadequate to assess jurisdiction on appeal); *Gafford v. General Electric Co.*, 997 F.2d 150 (6th Cir. 1993) (district court's evidentiary hearing on amount in controversy to determine jurisdiction on remand was proper where complaint did not specify amount of damages); *Shaw*, 994 F.2d 364; *Foret v. Southern Farm Bur. Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir. 1990) ("When the jurisdiction of a federal court is challenged, that court has a duty to make the inquiries necessary to establish its own jurisdiction. The trial court is not required to follow any set procedure in determining whether the jurisdictional amount has been satisfied. 'The blueprint of the method of determining the length and breadth of the amount in controversy is entirely within the discretion of the trial court.'" quoting *Opelika Nursing Home, Inc. v. Richardson*, 448 F.2d 658, 667 (5th Cir. 1971)); *Unrein v. Citgo Petroleum Corp.*, 1997 WL 18181 (D.Kan. January 10, 1997) (opinion unpublished); *McCorkindale v. American Home Assur.Co.*, 909 F.Supp.

646 (N.D. Iowa 1995) (district court may consider affidavits on issue of jurisdictional amount when amount of damages is not apparent from face of plaintiff's complaint); *White v. J.C. Penny Life Ins. Co.*, 861 F. Supp. 25 (S.D. W.Va. 1994); *Kennard v. Harris Corporation*, 728 F.Supp. 453 (E.D. Mich. 1989). In this regard, if the requisite jurisdictional facts exist, original jurisdiction exists in the federal court.

Harmons misconstrue *Baris*, 932 F.2d 1540 and improperly state that *Harmon* could not have been filed in federal court in the first instance (Petition, pp. 11-12). The record is abundantly clear that diversity of citizenship and amount in controversy, in fact, did exist at the time of removal. Indeed, Harmons have never denied these jurisdictional facts. Under *Baris*, the issue was not, as the Harmons suggest (Petition, p. 12), whether the Notice of Removal alleged facts necessary to establish diversity jurisdiction, but whether the record establishes that diversity jurisdiction actually existed at the time of removal. The Harmons could have commenced this action in federal court in the first instance because both complete diversity and jurisdictional amount existed at the time of removal. Neither Harmons' decision to file in state court, nor their alleged lack of knowledge about the specific dollar amount of injury suffered at the time of removal, operates to defeat Crown's right to remove the action.

In sum, the district court correctly determined that the defects in Crown's Notice of Removal fell into the category of "defects in removal procedure". These defects, standing alone, might have provided Harmons a path back to state court had they requested remand within thirty (30) days from removal. This the Harmons did not do. Rather, the Harmons waited almost two (2) years from the date of

removal, and only one (1) month before the district court's scheduled hearing on Crown's Motion for Summary Judgment, to file a Motion to Remand. Once the district court determined that the Harmons had waived the defects in Crown's Notice of Removal, it properly shifted its focus to the second inquiry discussed in *In Re Matter of Casualty Co.*, and independently assessed its subject matter jurisdiction. The district court discharged this duty prior to entry of judgment, as it was required to do, confirmed that diversity jurisdiction existed at the time of removal, and properly denied Harmons' Motion to Remand.

III. The District Court Correctly Assessed its Subject Matter Jurisdiction Under 28 U.S.C. § 1332(a) and Exercised its Discretion to Consider Information Not Contained in the Removal Papers.

Harmons incorrectly state that the Seventh Circuit has expanded federal jurisdiction beyond the United States Constitution and established Supreme Court precedent (Petition, p. 9). Harmons base their contention on a mistaken belief that federal constitutional law somehow prohibits a federal court from considering matters outside the removal papers when assessing its subject matter jurisdiction.

First, nothing in the language of Article III, Section 2, of the United States Constitution, 28 U.S.C. § 1332(a), 28 U.S.C. § 1441, or 28 U.S.C. § 1446(a) prohibits a district court from going outside the removal papers and reviewing the entire record in order to evaluate its subject matter jurisdiction.

Second, federal case law supports a federal court's discretion to go beyond the Complaint and Notice of Removal to determine the amount in controversy. *United*

Food, 30 F.3d 298, 305 ("[W]here the pleadings themselves are inconclusive as to the amount in controversy, however, federal courts may look outside those pleadings to other evidence in the record."); *Gould v. Artisoft, Inc.*, 1 F. 3d 544, (7th Cir. 1993); *Gafford,* 997 F.2d 150 (district court's evidentiary hearing on amount in controversy to determine jurisdiction on remand was proper where complaint did not specify amount of damages); *Shaw*, 994 F.2d at 366 (court may consider record as a whole); *Asociacion Nacional de Pescadores a Pequena Escala o Artesahales de Columbia v. Dow Quimica de Columbia S.A.*, 988 F.2d 559 (5th Cir. 1993), 114 S.Ct. 685 (1993) (post removal affidavits may be relevant where jurisdictional amount is unresolved); *Unrein*, 1997 WL 18181 (federal court may consider affidavits or independently assess jurisdiction); *McCorkindale,* 909 F.Supp. 646 (district court may consider affidavits on issue of jurisdictional amount when amount of damages is not apparent from face of plaintiff's complaint); *Mullins v. Harry's Mobile Homes, Inc.*, 861 F. Supp. 22 (S.D. W.Va. 1994) (court may consider relevant matters other than complaint and removal papers); *Kennard,* 728 F. Supp. 453 (court may consider affidavits submitted in opposition to remand).

Further, Harmons' mischaracterize the requirement that the "amount in controversy is determined on the basis of the record at the time the petition for removal is filed" -- Harmons cite Wright and Miller, *Federal Practice and Procedure*, § 3725, at 417 (1985) and *St. Paul Mercury Indemnity Co.*, 303 U.S. 283 (Petition, p. 10). This requirement does not mean that a federal court is limited to allegations contained in the removal papers when assessing its jurisdiction; rather, it means the federal court must limit its inquiry to facts that existed at the time of removal. Thus, if plaintiff's damages do not exceed $50,000 at the time of

removal, but subsequently damages grow to an amount exceeding $50,000, diversity jurisdiction does not exist. On the other hand, if damages exceed $50,000 at the time of removal, then jurisdiction exists even though the facts supporting jurisdiction are not discovered until after removal. Stated differently, jurisdiction will exist as long as the facts supporting jurisdiction exist at the time of removal.

Finally, Harmons' assertion that "flood gates of removal petitions" will occur if a district court is allowed to review the entire record in assessing its jurisdiction (Petition, p. 10) is nonsense. Indeed, if the record fails to disclose a basis for jurisdiction, the district court is required to remand the action back to state court.

Moreover, there are a number of safeguards built into the removal rules which prevent the "floodgate" abuse described by the Harmons. First, F.R.C.P. Rule 11 requires the defendant to have a good faith basis for removing an action to federal court. Thus, defendants will remove only when they believe federal jurisdiction exists. Second, if a plaintiff believes a removed action lacks jurisdictional amount, then the plaintiff will file a motion to remand. Similarly, if the court determines, prior to judgment, that jurisdictional amount does not exist, the court, *sua sponte*, will conduct an independent examination to assess its jurisdiction. None of these safeguards is adversely impacted if the district court reviews the entire record to determine federal jurisdiction.

For each of these reasons, the Seventh Circuit correctly concluded that probative matters contained in the record may be considered by the district court in assessing its jurisdiction, even though those matters may not have been expressly stated in the removal papers, or even known by the defendant at the time of removal.

CONCLUSION

Accordingly, Harmons have failed to demonstrate a true conflict in the Circuits on the jurisdictional issues asserted in their Petition, or any other basis for granting a Writ of Certiorari under Supreme Court Rule 10.

The Harmons failed to remand the action within thirty (30) days as required by 28 U.S.C. § 1447(c). Having failed to do so, the only issue remaining for the district court was whether diversity jurisdiction, in fact, existed at the time of removal. The district court undertook a close and independent examination of the record to assess its jurisdiction, and correctly determined that both diversity of citizenship and jurisdictional amount existed at the time of removal (nothing in 28 U.S.C. § 1332(a), the United States Constitution, or public policy requires the district court to limit its jurisdictional inquiry to the contents of a Notice of Removal). Based on these findings, and taking into consideration the Harmons' eleventh hour attempt to defeat federal jurisdiction in order to avoid summary judgment, the district court affirmed its jurisdiction and proceeded to resolve the action on its merits.

Simply stated, in all Circuit courts, if subject matter jurisdiction does not exist at the time of removal, the federal court will remand the action. The Seventh Circuit's opinion in *Harmon* does not change this result; indeed, *Harmon* affirms this principle. Thus, federal jurisdiction exists, and Harmons' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — NOTICE OF REMOVAL OF CIVIL ACTION WITH EXCERPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION NO. **IP93-1102 C**

JOSEPH and MARILYN HARMON,

Plaintiffs,

v.

OKI SYSTEMS, CROWN EQUIPMENT CORPORATION,

Defendants.

NOTICE OF REMOVAL OF CIVIL ACTION

Defendant, Crown Equipment Corporation ("Crown"), by counsel, pursuant to 28 U.S.C. §§ 1441 and 1446, notices the removal of an action from the Johnson Superior Court, Cause NO. 41D01-9307-CP-00199, captioned as *Joseph and Marilyn Harmon v. OKI Systems, Crown Equipment Corporation* (the "Action"), to this Court for trial and determination.

1. The Action was filed on July 28, 1993.

2. Copies of the Complaint and Process in said cause, which are collectively attached hereto as Exhibit "A," were served upon Defendant, Crown Equipment Corporation ("Crown"), on or about July 30, 1993.

3. On information and belief, Plaintiffs are residents of

Indiana. The Defendant, Crown Equipment Corporation, is an Ohio corporation doing business in Indiana. On information and belief, OKI Systems is an Ohio corporation doing business in Indiana. As such, this action is between citizens of different states as required by 28 U.S.C. § 1332.

4. Because this Action is a civil action over which this Court has original jurisdiction pursuant to 28 U.S.C. §1332, it is one which may be removed to this Court by Crown, pursuant to 28 U.S.C. §§ 1441 and 1446.

5. Written notice of the filing of this Notice of Removal will be given to the Plaintiffs as required by law.

6. A true copy of this Notice will be filed with the Clerk of the Johnson Superior Court as required by law.

BOSE McKINNEY & EVANS,

s/ Stephen E. Arthur
Stephen E. Arthur
Attorney No. 4055-49
George E. Purdy
Attorney No. 10749-41

2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 684-5000

Attorneys for Defendant,
Crown Equipment Corporation

Appendix A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing "Notice of Removal of Civil Action" has been served, by United States First Class Mail, postage prepaid, upon the following counsel of record this 20th day of August, 1993:

J. Kevin King
CLINE KING & KING, P.C.
1015 Third Street
Columbus, IN 47201

s/ Stephen E. Arthur
Stephen E. Arthur

Appendix A

EXCERPT FROM CROWN'S NOTICE OF REMOVAL OF CIVIL ACTION-EXHIBIT A HARMON'S COMPLAINT

* * *

. . . in the forklift to prevent or warn against the traveling of the forklift after the operator dismounted. Defendant Crown knew or in the exercise of reasonable care, should have known, the forklift would travel after the operator dismounted the forklift.

3. Defendant Crown had a duty to design and manufacture of the forklift to prevent or warn against such traveling. Defendant Crown breached its duty, and accordingly, Joe was injured.

4. As a proximate result of Defendant Crown's negligence, Joe suffered damages including, but are not limited to, personal injuries, physical and mental pain and suffering, medical expenses, lost wages, and other pecuniary damages.

5. The actions of Defendant Crown constituted reckless and wanton disregard for human safety. Accordingly, a judgement of punitive damages should be imposed to deter the conduct of Defendant Crown.

WHEREFORE, Joe and Marilyn, by counsel, pray for a judgment in an amount which will reasonably compensate them for their injuries incurred as a result of the negligence of Defendant Crown; a judgement of punitive damages to deter the reckless conduct of the Defendant Crown; costs of this action, and for all other necessary and proper relief under the premises.

Appendix A

Respectfully submitted,
CLINE, KING & KING, P.C.

s/ J. Kevin King
J. Kevin King, #10849-03

s/ Peter C. King
Peter C. King, #5394-03

COUNT II: STRICT LIABILITY: CROWN

1. Joe and Marilyn reallege and incorporate herein by reference each and every allegation contained in paragraph 1 of Count I as if fully set out herein.

2. Prior to July 26, 1991, the forklift was placed in the stream of commerce by Defendant Crown.

3. At the time Defendant Crown placed the forklift in the stream of commerce, it contained an unreasonably dangerous condition in that there was no warning or safety device regarding the foreseeable condition that the forklift would travel after the operator dismounted. Defendant Crown is strictly liable . . .

* * *

APPENDIX B — CROWN EQUIPMENT CORPORATION'S CIVIL COVER SHEET

CIVIL COVER SHEET

IP93-1102 C

* * *

I. (a) PLAINTIFFS:

JOSEPH and MARILYN HARMON

* * *

DEFENDANTS:

OKI SYSTEMS, CROWN EQUIPMENT CORPORATION

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT *Ohio Corp.*

* * *

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER):

J. Kevin King
CLINE KING & KING, P.C.
1015 Third Street
Columbus, IN 47201 (812) 372-8461

Appendix B

ATTORNEYS (IF KNOWN):

Stephen E. Arthur
BOSE McKINNEY & EVANS
2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, IN 46204 (317) 684-5000

II. BASIS OF JURISDICTION (Place an x in one box only):

* * *

☒ **4 Diversity**
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an x in one box for plaintiff and one box for defendant): (For Diversity Cases Only)

	PTF	DEF
Citizen of This State	☒ 1	☐ 1

* * *

Incorporated *and* Principal Place of Business in Another State	☐ 5	☒ 5

* * *

IV. CAUSE OF ACTION (Cite the U.S. civil statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.):

28 U.S.C. §1332; 28 U.S.C. §§1441 and 1446.

Appendix B

V. NATURE OF SUIT *(Place an x in one box only)*:

* * *

TORTS

PERSONAL INJURY:

☒ 365 Personal Injury — Product Liability

* * *

VI. ORIGIN *(Place an x in one box only)*:

* * *

☒ 2 Removed from State Court

* * *

DATE	SIGNATURE OF ATTORNEY OF RECORD
8-20-93	*Attny #4055-49* s/ Stephen E. Arthur

APPENDIX C — EXCERPTS FROM CROWN EQUIPMENT CORPORATION'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT A-HARMONS' ANSWERS TO CROWN'S 1ST SET OF INTERROGATORIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION NO. IP93-1102C

JOSEPH and MARILYN HARMON,

Plaintiffs

v.

OKI SYSTEMS, CROWN EQUIPMENT CORPORATION,

Defendants.

CROWN EQUIPMENT CORPORATION'S FIRST SET OF INTERROGATORIES TO PLAINTIFFS

Comes now Joseph and Marilyn Harmon, by counsel, and responds to Defendant Crown Equipment Corporation's First Set of Interrogatories to Plaintiffs.

Appendix C

Interrogatories

1. State:

   a. Your full name;

      Joseph G. Harmon.

   b. Last address;

      200 S. Pleasant St., Edinburgh, IN 46124.

   c. Marital status at time of the accident;

      Married.

   d. Social security number, and;

      SSN#311-40-2836.

   e. Date and place of birth.

      DOB: November 6, 1941 in Edinburgh, Indiana.

2. State:

   a. The name and location of each school you have attended;

      (1) Edinburgh Elementary

      (2) Edinburgh High School

Appendix C

b. The month and year (s) of attendance, and;

* * *

See answer a above.

10. Itemize the medical expenses you claim to have incurred as a result of the Accident.

The following is an itemization to date of all billings in possession of myself or my attorneys:

Int. Med. Associates

07/30/91 – Comprehensive Initial Consultation $150.00
07/31/91 – Intermediate Subsequent Hospital Care 60.00
08/01/91 – Intermediate Subsequent Hospital Care 840.00

TOTAL $1,050.00

C. Scott Vore, M.D.

07/29/91 – Toe Repair $385.00

Richard L. McCammon, M.D.

08/05/91 – Cleansing of Skin/Tissue $315.00

Scott Beall, M.D.

08/09/91 – ..... $ 280.00
08/12/91 – 1,260.00

TOTAL $1,540.00

Appendix C

Irvington Radiologists, Inc.

07/29/91	– Chest, Single View	$19.00
	– Ankle, AP & Lateral	17.00
	– Ankle, AP & Lateral	17.00
	– Foot, AP & Lateral	17.00
	TOTAL	$70.00

Infectious Disease of Indiana

07/30/91	– IH Consultation	$139.00
07/31/91	– IH Daily Visit	518.00
08/14/91	– IH Discharge Management	53.00
08/22/91	– IH Consultation	139.00
08/23/91	– IH Daily Visit	259.00
11/14/91	– IH Discharge Management	53.00
	TOTAL	$1,161.00

Physician Diagnostic Consultants, Inc.

07/30/91	– CPK Isoenzyme	$ 55.00
08/05/91	– Sug Path Uncmplictd	88.00
08/06/91	– Surg Path Uncmplictd	88.00
08/12/91	– Surg Path Uncmplictd	88.00
	TOTAL	$319.00

James B. Tandy, M.D.

08/26/91	– Initial IP Consult	$125.00
08/27/91	– DV – C	80.00

Appendix C

08/29/91	– DV – C	80.00
08/30/91	– DV – C	80.00
	TOTAL	$365.00

Michael S. Yacko, M.D.

08/02/91	– Anesthesiologist	$256.00

Community Pulmonary Associates, Inc.

08/24/91	– Initial Consultation Complex	$175.00
08/25/91	– Hospital Care Intermediate	390.00
	TOTAL	$565.00

Columbus Regional Hospital

12/06/91	– Outpatient Services	$247.50

Castleton Orthopaedic Clinic, Inc. — R. Daniel Zieg, M.D.

07/29/91	– ER After Hours	$100.00
	– Arthrotomy Fo	525.00
	– Disloc Tarsom	1,065.00
08/05/91	– Fx Ankle Bima	1,365.00
	– Arthrotomy	704.00
	– Fx Calcaneus	1,239.00
	– Debridement S	557.00
08/12/91	– Debridement S	557.00
	– Fx MT ORIF	803.00
	– Fx MT ORIF	803.00
	– Fx MT ORIF	803.00

Appendix C

11/05/91	– Intermediate	$35.00
	– Ankle X-ray	45.00
	– Foot X-ray	45.00
01/27/92	– OV EST PT INT	35.00
	– Foot X-ray	45.00
02/24/92	– Intermediate	35.00
	– Foot X-ray	45.00
	– Ankle X-ray	45.00
03/24/92	– OV EST PT EXT	40.00
	– Foot X-ray	45.00
	– Ankle X-ray	45.00
04/21/92	– OV ESTABLE PT	45.00
	– Knee X-ray	50.00
	– Foot X-ray	45.00
04/29/92	– Removal Impla	588.00
	– Manipul Ankle	373.00
05/11/92	– Ankle X-ray	45.00
06/15/92	– Ankle X-ray	45.00
	– OV ESTAB PT	30.00
07/06/92	– Ankle X-ray	50.00
08/17/92	– OV ESTABL PT	50.00
	– Foot X-ray	50.00
09/09/92	– Ostectomy Cal	1,365.00
	– Debride Wound	276.00
09/28/92	– Heel X-ray	45.00
11/16/92	– OV ESTAB PT	35.00
	– Heel X-ray	45.00
05/17/93	– Office Visit	50.00
06/28/93	– Disability Form	20.00
08/16/93	– Calcaneal Spu	35.00
11/22/93	– Calcaneal Spu	35.00
	TOTAL	$12,258.00

Appendix C

Community Hospitals Indianapolis

07/29/91	– Pharmacy	$ 116.80
	– IV Solutions	75.00
	– Medical/Surgical Supply	543.00
	– Laboratory	65.00
	– Lab/Chemistry	103.00
	– Lab/Hemotology	28.00
	– Lab/Bact-Micro	64.00
	– Radiology Diagnostic	179.00
	– Diagnostic Chest X-ray	54.00
	– Operating Room Services	595.00
	– Anesthesia	105.00
	– Respiratory Services	38.00
	– Emergency Room	303.00
	– Recovery Room	291.00
	– EKG/ECG	58.00
08/14/91	– Room & Board Semi PVT	5,136.00
	– Pharmacy	5,839.00
	– Pharmacy Take Home Drugs	147.80
	– Drugs/Radiology	113.00
	– IV Solutions	463.00
	– Medical/Surgical Supply	3,225.00
	– Prosthetic Device	39.00
	– Laboratory	508.00
	– Lab/Chemistry	225.00
	– Lab/Hemotology	291.00
	– Lab/Bact-Micro	645.00
	– Laboratory Pathological	157.00
	– Radiology Diagnostic	944.00
	– Diagnostic Chest X-ray	172.00
	– Nuclear Med. Diagnostic	643.00
	– Operating Room Services	3,508.00

Appendix C

	– Anesthesia	735.00
	– Respiratory Services	421.00
	– Physical Therapy	35.00
	– Physical Therapy Eval/Re-Eval	40.00
	– Recovery Room	644.00
08/21/91	– OR Class A-lst HR	940.00
	– Anesthesia – 1st HR	175.00
08/30/91	– Room & Board Semi PVT	2,889.00
	– Pharmacy	966.05
	– Pharmacy Take Home Drugs	576.13
	– Drugs/Radiology	113.00
	– IV Solutions	100.00
	– Medical/Surgical Supply	1,069.00
	– Laboratory	148.00
	– Lab/Chemistry	59.00
	– Lab/Hemotology	178.00
	– Lab/Bact-Micro	91.00
	– Radiology Diagnostic	62.00
	– Diagnostic Chest X-ray	108.00
	– Nuclear Med. Diagnostic	643.00
	– Operating Room services	753.00
	– Anesthesia	140.00
	– Respiratory Services	16.00
	– Recovery Room	322.00
	– EKG/ECG	58.00
10/20/91	– Radiology Diagnostic	141.00
	TOTAL	$36,095.78

Indiana Surgery Center

06/03/92	–	$1,412.07

Appendix C

11. Have you ever made any claims for:

Objection: This information calls for information which is objectionable pursuant to the collateral source rule. Without waiving any objections, my answer would be:

a. Worker's compensation,

Yes.

b. Social security disability,

Yes.

c. Medicaid,

Yes.

* * *

. . . and the approximate amount of money expended to date for the purchase of each medication listed.

I have taken Relafen, Voltaren, Feldene, PROPO-N/APAP100-650, Loestrin-Fe, Cephalexin, Duoderm, Polysporin, and Propacet. Find attached a computer printout from my pharmacy containing the dates, costs, and amounts taken as a result of this injury.

20. Describe, with particularity, the extent to which you allege that your injuries have resulted in permanent partial impairment, temporary total disability, or total disability, and

specify how you have calculated the exact dates and degree/ percentage of said disabilities.

Objection: This answer calls for an expert opinion which I am unable to answer. Without waiving any objections, I cannot walk or stand for very long periods of time. I cannot put pressure on my injured foot.

21. Has any physician or Healthcare Provider prepared any written statement or report as to your impairment rating of the person as a whole? If so, please state the name, address, and telephone number of each Healthcare Provider who has prepared a report, the date of each report, and the current custodian of each report.

None at this time.

22. If, since the date of the Accident, you have been required to use any appliance, such as a cane, crutch, medical brace, wheelchair, corset, or other device:

a. Describe the type of each device;

(1) Stretcher and Ambulance Service.

(2) Wheel chair.

(3) Crutches.

(4) Cane.

(5) Walker.

(6) Electric hospital bed.

Appendix C

b. The date it was prescribed;

(1) August of 1991 to November of 1991.

(2) November of 1991 to January of 1992.

(3) January of 1992 to the present.

(4) See (3) above.

(5) See (3) above.

(6) September of 1991 to October of 1991.

c. The period during which the device has used, and;

See b. above.

d. The Healthcare Provider who prescribed it;

Dr. Kincead.

e. The approximate amount of money expended by you to date for the purchase and/or rental of the device.

08/23/91 - S/E Bed with side rails/ half rails ..... $ 256.08
09/10/91 - Electric Hosp. Bed 155.00
09/10/91 - Half Length Side rails 15.00
09/10/91 - Full Fracture Frame Invacare 40.00
09/27/91 - Ambulance Wheelchair Service 70.00
09/30/91 - Ambulance Wheelchair Service 70.00

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10/01/91 - Walker Folding Youth 15.75
10/01/91 - Adult Folding Walker Pharmasea ... 15.75
10/02/91 - Ambulance Wheelchair Service..... 70.00
10/03/91 - Adult Folding Walker Pharmasea ... 15.75
10/03/91 - Walker Folding Youth 15.75
10/03/91 - Walker Extension Legs Guardian 5.25
10/04/91 - Ambulance Wheelchair Service..... 70.00
10/07/91 - Ambulance Wheelchair Service..... 70.00
10/09/91 - Ambulance Wheelchair Service..... 70.00
10/10/91 - Electric Hospital Bed..... 155.00
10/10/91 - Half Length Side rails..... 15.00
10/10/91 - Full Fracture Frame Invacare..... 40.00
10/11/91 - Ambulance Wheelchair Service..... 70.00
11/03/91 - Adult Folding Walker Pharmasea ... 15.75
11/03/91 - Walker Folding Youth 15.75
11/03/91 - Walker Extension Legs Guardian 5.25
11/04/91- Elevating Leg rest Breezy..... 8.40
11/04/91 - LT WT Wheelchair Breezy 63.00
12/03/91 - Walker Folding Youth 15.75
12/03/91 - Walker Extension Legs Guardian 5.25
12/04/91 - Elevating Leg rest Breezy..... 8.40
12/04/91 - LT WT Wheelchair Breezy 63.00
01/03/92 - Walker Extension Legs Guardian 5.00
01/03/92 - Walker Folding Youth 15.00
01/04/92 - Elevating Leg rest Breezy..... 8.00
01/04/92 - LT WT Wheelchair Breezy 60.00
01/31/92 - Large Base Quad Cane 37.80
02/03/92 - Walker Extension Legs Guardian 5.00
02/03/92 - Walker Folding Youth 15.00
02/04/92 - Elevating Leg rest Breezy..... 8.00
02/04/92 - LT WT Wheelchair Breezy 60.00
03/03/92 - Walker Extension Legs Guardian 5.00
03/03/92 - Walker Folding Youth 15.00

Appendix C

03/04/92 - Elevating Leg rest Breezy 8.00
03/04/92 - LT WT Wheelchair Breezy 60.00
04/03/92 - Walker Extension Legs Guardian 5.00
04/03/92 - Walker Folding Youth 15.00
05/03/92 - Walker Extension Legs Guardian 5.00
05/03/92 - Walker Folding Youth 15.00
06/03/92 - Walker Extension Legs Guardian 5.00
06/03/92 - Walker Folding Youth 15.00
07/03/92 - Walker Extension Legs Guardian 5.00
07/03/92 - Walker Folding Youth 15.00
08/03/92 - Walker Extension Legs Guardian 5.00
08/03/92 - Walker Folding Youth 15.00
09/03/92 - Walker Extension Legs Guardian 5.00
09/03/92 - Walker Folding Youth 15.00
10/03/92 - Walker Extension Legs Guardian 5.00
10/03/92 - Walker Folding Youth 15.00
11/03/92 - Walker Extension Legs Guardian 5.00
11/03/92 - Walker Folding Youth 15.00
12/03/92 - Walker Extension Legs Guardian 5.00
12/03/92 - Walker Folding Youth 15.00
01/03/93 - Walker Extension Legs Guardian 5.00
01/03/93 - Walker Folding Youth 15.00
02/03/93 - Walker Extension Legs Guardian 5.00
02/03/93 - Walker Folding Youth 15.00
03/03/93 - Walker Extension Legs Guardian 5.00
03/03/93 - Walker Folding Youth 15.00
04/03/93 - Walker Extension Legs Guardian 5.00
04/03/93 - Walker Folding Youth..... 15.00
05/03/93 - Walker Extension Legs Guardian 5.00
05/03/93 - Walker Folding Youth 15.00
06/03/93 - Walker Extension Legs Guardian 5.00
06/03/93 - Walker Folding Youth 15.00
07/03/93 - Walker Extension Legs Guardian 5.00

Appendix C

07/03/93 - Walker Folding Youth 15.00
07/20/93 - Walker Extension Legs Guardian ... 12.00
07/20/93 - Walker Folding Youth 22.00

Total $2,100.68

Find attached a listing from Hooks regarding the walker, wheelchair, electric hospital bed, and quad cane. Also attached is billing statements for the cost of the ambulance and stretcher from Meyers Ambulance Service.

23. Do you claim lost income or wages as a result of the Accident? If so, state the following:

a. The name and address of your employer;

See answer 3 above.

b. The date(s) which you were unable to work;

From the date of the incident to present.

c. Your rate of pay, whether hourly or salary;

Hourly, $16.33 – $653/wk.

d. Your total lost income incurred to date; and,

124 weeks from date of loss to present. 124 * $653 = $80,972.

e. All future lost income, if any, that you claim resulted from the Accident.

Objection: This would require a present calculation of future income. I am not qualified to perform such a calculation.

24. List all workers' compensation claims, or claims for any social security disability, Medicaid, healthcare, unemployment, disability, or other benefits which you have made both prior to and since the Accident. Identify any individual or organization who claims or may claim a lien for any monies paid to you as a result of this Accident, and the amount of such lien.

Objection: This question is over broad. It requires the Plaintiff to state all worker's compensation claims, or claims for any social security disability, medicaid, health care, unemployment, disability, or other benefits which he has made both prior to and since the accident. Mr. Harmon is 52 years old. It is also contrary to *Canfield vs. Sandock*, (1990) 563 N.E.2d 526 and *Becker vs. Plemmons*, (1992) Ind.App. 598 N.E.2d 564. Without waiving any objections my answer would be: Liberty Mutual has a lien for monies paid as a result of this incident.

25. Does Mr. Harmon have a prescription for eyeglasses or contact lens or does he wear eyeglasses or contact lens? If so,:

a. Was he wearing his eyeglasses or contact lens at the time of the Accident, and;

Yes.

Appendix C

b. Identify your prescription;

As of 8/13/92 it was 20/20 with proper corrective wear.

* * *

Appendix C

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT B-CASE MANAGEMENT PLAN-PAGE 2

* * *

II. *Factual Synopsis*:

A. *Plaintiffs*

Joe Harmon worked at Cummins Engine Company, Indianapolis, Indiana. He was a janitor who operated a fork lift manufactured by Crown and distributed by OKI.

On July 29, 1991, Joe was operating a fork lift at Cummins. Joe had stopped to get off the fork lift. Once stopped, Joe got off and walked around to the front of the fork lift to move something. Once in front of the fork lift, the brakes failed to keep the fork lift from moving. The fork lift pinned Joe Harmon between it and a concrete wall.

As a result of the incident, Joe has undergone extensive surgery and incurred medical expenses of approximately $65,000. Joe is permanently disabled from his occupation. He suffers from disfiguration and mobility of his right foot. This affects his walking, standing, and balance. Marilyn is required to help Joe on a daily basis.

B. *Defendants*

Defendants Crown Equipment Corporation and OKI Systems incorporate herein the factual assertions and

denials contained in their Answers and Affirmative Defenses to Plaintiffs' Complaint previously filed in this cause.

III. *Legal Theories*:

Plaintiffs:

COMMON ALLEGATIONS AS TO ALL COUNTS

At all times material to this action, Plaintiffs, Joseph and Marilyn Harmon were residents of the County of Johnson, State of Indiana. All times material to this action, Defendant Crown Equipment Corporation (hereinafter "Crown") was and is an organization existing under the laws if the State of Ohio and licensed to do business in the state of Indiana and doing business in the County of Johnson, State of Indiana. Crown produced and manufactured forklifts for purpose of sale and distribution in the United States of America, including State of Indiana, Johnson County. At all times material to this action, Defendant OKI Systems (hereinafter "OKI") was and is an organization existing under the laws of the State of Ohio and licensed to do business in the State of Indiana and doing business in the County of Johnson, State of Indiana. OKI sold, distributed, and maintained the forklift manufactured by Crown which is the subject matter of this litigation. All times material to this action, Cummins Engine Company (hereinafter "Cummins") was and is an organization existing under the laws if the State of Indiana and licensed to do business in the state of Indiana and doing business in the County of Marion, State of Indiana. Cummins purchased or leased the forklift in question.

Appendix C

Al times material to this action, Defendant Crown designed, manufactured, assembled, and distributed the forklift in issue, model number 45-RRTT-S; serial number H-15440-4 (hereinafter "forklift") that is the subject of this action. Al times material to . . .

* * *

Appendix C

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT-C-HARMONS' ATTORNEY LETTER

CLIVE
KING &
KING, P.C.

1015 Third Street
P.O. Box 250
Columbus, Indiana
47202-0250

Telephone
812-372-8461

Facsimile
812-372-2544

July 1, 1994

Stephen E. Arthur/George E. Purdy
Bose McKinney & Evans
2700 First Indiana Plaza
135 N. Pennsylvania Street
Indianapolis, Indiana 46204
Fax: 317-684-5173

Randell Helman
Hume Smith Geddes & Green
54 Monument Circle, Suite 400
Indianapolis, IN 46204
Fax: 317-632-5595

Appendix C

Re: Richard and Sandra Finchum v. Ford Motor Company and Kia Motors Company, Cause No. IP 92 39 4C

Counsel:

Find enclosed Plaintiffs' Preliminary Witness and Exhibit Lists and Plaintiffs' Preliminary Contentions which were filed today pursuant to the Case Management Plan.

With regard the statement of special damages, please see Plaintiffs' Interrogatory Answers (10, 22e, and 23d regarding medical expenses and lost wages claimed as a result of this incident). Also see Plaintiffs' responses to Defendants' Request for Production #4. You have been in possession of this information since January 6, 1994. The following is a listing of the information in the above referenced interrogatories:

Past Medical Expenses	*$56,039.35*
Costs (Stretcher/Ambulance, Wheel chair, Crutches, Care Walker, Electric bed)	*2,100.68*
124 weeks (July 29, 1991 to December 13, 1993)	*80,972.00*
28 weeks (December 20, 1993 to June 27, 1994)	*18,284.00*
Total of Special Damages as of January 6, 1994	*$157,396.03*

There was another surgery on Joe's foot in February 1994. As of this date, our firm has not received the billing statement outlining the charges associated with this surgery. With regard to lost wages, the above numbers are extremely conservative. The amount does not include any type of raises in which Joe would have received over the three and half years he has been out of work.

Appendix C

Marilyn has been damaged by the loss of consortium and companionship. Marilyn is the primary care taker of Joe. She is required to be around Joe to assist with any problems he may have with his foot, balance, or walking.

You have deposed Joe and Marilyn and know they are honest folks. You also know about the lost quality of life they have endured. The lost quality of life for the Harmons cannot be described in a letter. However, every aspect of their life has been affected from leisure time to work.

Based upon the above, our victims have authorized our firm to demand $1.8 million dollars for settlement of this action. This amount can be divided in any manner agreed upon by both Defendants.

The purpose of this letter is for settlement only and should not be construed for any other purpose. This letter is being mailed to your attention on July 1, 1994.

With kind regards, I remain.

Cordially,

CLINE, KING & KING, P.C.

s/ J. Kevin King
J. KEVIN KING

JKK/mjn

Appendix C

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT F-AFFIDAVIT OF RICHARD JOHNSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION NO. IP93-1102-C H/G

JOSEPH AND MARILYN HARMON,

Plaintiffs,

v.

OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

Defendants.

AFFIDAVIT OF RICHARD JOHNSON

Affiant, Richard Johnson, being duly sworn upon his oath, states as follows:

1. Mr. Johnson is the Operations Manager for OKI Systems, Inc., and has personal knowledge of the matters stated in this Affidavit.

2. OKI Systems, Inc. is a corporation incorporated in the State of Ohio. OKI Systems, Inc. maintains its principal place of business and corporate headquarters in Cincinnati, Ohio. In addition, on the date Plaintiffs filed their Complaint, July 28, 1993, and on the date removed this action, August 20, 1993,

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OKI Systems, Inc. was an Ohio corporation maintaining its principal place of business and corporate headquarters in Cincinnati, Ohio.

3. OKI Systems, Inc. has never been incorporated in the State of Indiana and has never maintained a principal place of business in the State of Indiana.

Further, Affiant saith not.

s/ Richard Johnson
Richard Johnson

Appendix C

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT G-AFFIDAVIT OF JOHN MAXA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION NO. IP93-1102-C H/G

JOSEPH AND MARILYN HARMON,

Plaintiffs,

v.

OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

Defendants.

AFFIDAVIT OF JOHN MAXA

Affiant, John G. Maxa, being duly sworn upon his oath, states as follows:

1. Mr. Maxa is the Vice President and General Counsel for Crown Equipment Corporation, and has personal knowledge of the matters stated in this Affidavit.

2. Crown Equipment Corporation is a corporation incorporated in the State of Ohio. Crown Equipment Corporation maintains its principal place of business and corporate headquarters in New Bremen, Ohio. In addition, on the date Plaintiffs filed their Complaint, July 28, 1993, and the date

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Crown Equipment Corporation removed this action, August 20, 1993, Crown Equipment Corporation was an Ohio corporation maintaining its principal place of business in New Bremen, Ohio.

3. Crown Equipment Corporation is not incorporated in the State of Indiana and has never maintained its principal place of business in the State of Indiana.

* * *

APPENDIX D — EXCERPT FROM HEARING ON MOTION TO REMAND DATED SEPTEMBER 18, 1995

EXCERPT FROM HEARING ON MOTION
TO REMAND-SEPTEMBER 18, 1995

* * *

[6]MR. KING: I am sorry?

THE COURT: Do you contend that Mr. and Mrs. Harmon are citizens of any state other than the state of Indiana?

MR. KING: Your Honor, at this point I do not. But that is not the critical point of analysis at the time of the removal.

THE COURT: I understand.

Do you dispute that they were citizens of Indiana at the time of the removal or at the time the complaint was filed?

MR. KING: Okay.

THE COURT: Do you dispute that they were citizens of Indiana at the time the complaint or petition for removal were filed?

MR. KING: Your Honor, I do not. But again, that is not our burden. The burden is upon the removing party to affirmatively show those to this court.

THE COURT: I understand your argument.

Next, do you contend that the defendants are citizens of Indiana, or were at any relevant point?

MR. KING: I do not know the answer to that question, your Honor, at the time of removal. Because the burden is upon the removing party to show that to the court. That is not my burden.

THE COURT: I understand your position.

Now, I have got some more questions about that. But do you [7] dispute that you and — rather, that each of the Harmons is seeking in excess of $50,000 in damages?

MR. KING: Your Honor, at the time of removal, I can tell this court that I don't know with a reasonable probability whether this case is worth more than $50,000.

THE COURT: Okay, what changed between that and the settlement?

MR. KING: Well, your Honor, naturally, there is some discovery that would occur. The court requested us — and I want to make it very clear that the settlement was part of — the settlement demand was part of the pretrial order that forced the plaintiffs to essentially come forward with something. And that was pursuant to a case management plan.

That was after the removal petition. And again, that is not my burden because the law requires us to look at the time of removal.

THE COURT: What changed between the time of removal and the time of worry about a settlement?

MR. KING: Well, your Honor, I believe that further discovery, preparing the case for interrogatory answers, requests

for production of documents, all of those type of things would then come around to being, which would occur after the point of removal.

Your Honor, established case law requires this court to remand this case for Crown's failure to have subject matter . . .

* * *